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Admiralty Law - Are Seamen Still The "Wards of Admiralty"? Sutton v. Earles: Ninth Circuit Extends Loss of Society Damages To Non-dependent Parents of Non-seamen In Maritime Wrongful Death Action

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ADMIRALTY LAW

ARE SEAMEN STILL THE "WARDS OF ADMIRALTY"? *SUTTON v. EARLES*: NINTH CIRCUIT EXTENDS LOSS OF SOCIETY DAMAGES TO NON-DEPENDENT PARENTS OF NON-SEAMEN IN MARITIME WRONGFUL DEATH ACTION

"Have you news of my boy Jack?"
Not this tide.
"When d'you think that he'll come back?"
Not with this wind blowing, and this tide.
"Has anyone else had word of him?"
Not this tide.
For what is sunk will hardly swim,
Not with this wind blowing, and this tide.
"Oh, dear, what comfort can I find?"
None this tide,
Nor any tide,
Except he did not shame his kind —
Not even with the wind blowing, and that tide.
Then hold your head up all the more,
This tide,
And every tide;
Because he was the son you bore,
And gave to that wind blowing and that tide.[1]

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1. RUDYARD KIPLING, *My Boy Jack*, *in* RUDYARD KIPLING'S VERSE, 216

I. INTRODUCTION

In *Sutton v. Earles*[2] (*"Earles II"*), the Ninth Circuit addressed an issue of first impression, namely whether in a wrongful death action, under general maritime law,[3] loss of society damages[4] could be awarded to the parents of non-sea-

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(Doubleday and Company, Inc., 1940) (1914-18). Kipling's poem, portraying the anguish of the mother of a seaman lost at sea, captures the essence of the loss of society issue as it relates to the American merchant seaman's struggle for a standard of living on par with the rest of American society. For a concise yet comprehensive historical background of the struggle for seamen's rights, see chapter one of Mariam Sherar's sociological study of the American merchant seaman. *See* MARIAM G. SHERAR, SHIPPING OUT 1-6 (Cornell Maritime Press, Inc. 1973). It is the author's hope that readers keep this poem in mind, as well as the struggle for parity it symbolizes, when considering this review of recent admiralty law cases.

2. Sutton v. Earles, 26 F.3d 903 (9th Cir. 1994) (per Canby, J.; the other panel members were Tang, J., and Beezer, J.), *remand before appeal*, Earles v. United States, 935 F.2d 1028 (9th Cir. 1991) (per Leavy, J, with whom Browning, J., joined; Pregerson, J., dissenting). This case is hereinafter referred to as *"Earles II"* because it was decided on remand from a prior Ninth Circuit decision, *Earles v. United States*, which the court refers to in *Sutton v. Earles* as *"Earles I."* *See Earles II*, 26 F.3d 903, 906 (9th Cir. 1994).

3. The general maritime law of the United States is federal court-made law that, absent preemptive legislation, applies to cases brought in pure admiralty jurisdiction (federal court only), as well as other maritime cases (brought either in state or federal court, but relying on maritime principles). U.S. CONST. art. III, § 2, cl. 1 (extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction). *See* 28 U.S.C. § 1333 (1988) (codifying the federal courts' authority to develop a substantive body of general maritime law); Southern Pacific v. Jensen, 244 U.S. 205, 254 (1917) (holding that state law that changes, modifies, or affects the interstate uniformity of the general maritime law is unconstitutional). *See also* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 4-1, at 121 n.3 (1987 & Supp. 1992).

4. Loss of society damages are those damages in a wrongful death action which compensate the decedent's beneficiary for deprivation of the decedent's continued existence, including: love, affection, care, attention, companionship, comfort, and protection. Sea-Land Services v. Gaudet, 414 U.S. 573, 585 (1974). *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 127, at 949-54 (5th ed. 1984) (noting developments, trends, and issues concerning awards for loss of society in the common law of torts). Loss of society damages are non-pecuniary, but recovery for the dependent's mental anguish or grief is prohibited. *Gaudet*, 414 U.S. at 585 n.17. In theory, loss of society damages under general maritime law compensate for losses that would be awarded in a land based tort law action under loss of consortium, and include amounts for deprivation of the decedent's existence generally. *See id.* at 585. Therefore, a claim for loss of society is substantially the same as one for loss of consortium. Nichols v. Petroleum Helicopters, Inc., 17 F.3d 119, 122 n.4 (5th Cir. 1994). For clarity, this comment will use the term embraced by admiralty courts, loss of society.

men[5] killed in territorial waters[6] regardless of whether the

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5. Seamen have special status in admiralty and maritime law: a seaman is one who is employed on a vessel and whose duties contribute to the accomplishment of the vessel's mission. McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 355 (1991). The decedents in *Earles II* were passengers in a pleasure craft, and thus were not seamen. *Earles II*, 26 F.3d at 915.

Seaman status is primarily a statutory privilege which, among other things, allows the claimant to take advantage of certain substantive aspects of maritime law which differ from traditional tort law. *See* 46 U.S.C. app. § 688 (1988) (section 688 is referred to as "the Jones Act"). First, under the Jones Act, the defendant-employer owes a seaman a higher duty of care, the so called "featherweight standard" of liability, the standard for breach is "the slightest negligence." Simeon v. T. Smith & Son, Inc., 852 F.2d 1421, 1430 (5th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989). Second, under the Jones Act a seaman may recover under a more lenient standard of proximate cause which merely requires that the defendant-employer's negligence contributed "in the slightest degree" to the injury or death. Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 523 (1957).

A seaman also has a right to recover under the general maritime law for any unseaworthiness of the vessel which caused his accident. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549 (1960). This action does not require proof of negligence by the seaman's employer, rather it requires proof that the vessel or appurtenance was not reasonably fit for its intended purpose and there was a causal connection between this and the seaman's injury or death. *Id.* at 550. Under the unseaworthiness theory, recovery is akin to strict liability and the lenient Jones Act standard of proof does not apply. *Id.* at 549. Such examples of preferential treatment toward seamen are common in admiralty jurisdiction and are justified by the policy of "special solicitude." *See* Harden v. Gordon, 11 F.Cas. 480, 483 (C.C.D. Me. 1823). *See generally* SCHOENBAUM, *supra* note 3, § 5-1 at 158 (noting that seamen have access to special remedies not awarded others under the law of admiralty).

In the words of Justice Joseph Story, the rationale for providing seamen special solicitude, admiralty law's greatest protection, is:

> [to effectuate the] public policy of preserving [seamen] for the commercial service and maritime defence of the nation. Every act of legislation which secures their healths, . . . is as wise in policy, as it is just in obligation. Even the merchant himself derives an ultimate benefit from what may seem at first an onerous charge. It encourages seamen to engage in perilous voyages with more promptitude. . . .

Harden, 11 F.Cas. at 483 (noting that elements of the principle of "special solicitude" to seamen are present in the laws of most principal maritime nations and can, in Anglo-American jurisprudence, be traced back to the medieval sea code, *the Rolls of Oleron*). *See also Gaudet*, 414 U.S. at 577; Moragne v. States Marine Lines, 398 U.S. 375, 386-88 (1970).

6. Territorial waters are that portion of the sea that extends out three nautical miles (one maritime league) from the coast line of a state, and over which that state exercises sovereignty. *See* RENE DE KERCHOVE, INTERNATIONAL MARITIME DICTIONARY 828 (D. Van Norstrand Co., 2d ed. 1961). In contrast, the high seas are that continuous body of navigable salt water that lies outside territorial waters and the maritime lines of demarcation of various nations. *Id.* at 371-72. It should be noted that for purposes of international law of the sea, the "territorial

parents were financial dependents of the decedents.[7] The court held that the non-dependent parents of decedents killed in an allision[8] between a pleasure craft and a Navy mooring buoy could recover for loss of society.[9] The court reasoned that the financial dependency requirement, used by the Second, Fifth and Sixth Circuits[10] when deciding whether to award loss of society in maritime wrongful death actions, was inconsistent with the humanitarian policy of providing extended remedies to those who bring suit in admiralty jurisdiction.[11] The Ninth Circuit's reasoning de-emphasizes the importance of fashioning uniform recovery between maritime wrongful death actions that are brought solely under general maritime law and those brought under the federal maritime statutory scheme.[12]

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sea" of the United States has been extended to twelve nautical miles. Proclamation No. 5928, 54 Fed. Reg. 777 (1988). This definition of the territorial sea, however, is distinct from territorial waters for maritime wrongful death purposes, and does not affect admiralty jurisdiction generally. *See* SCHOENBAUM, *supra* note 3, § 2-1 at 20; 1 BENEDICT ON ADMIRALTY § 141, at 9-3 (7th ed. 1988).

7. *Earles II*, 26 F.3d at 920.

8. An allision is, in maritime terminology, the striking of a moving vessel against a stationary object. BLACK'S LAW DICTIONARY 75 (6th ed. 1990).

9. *Earles II*, 26 F.3d at 914-17.

10. *Id.* at 916-17, 916 n.14. *See* Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084, 1090-93 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994); Anderson v. Whittaker Corp., 894 F.2d 804, 811-12 (6th Cir. 1990) (both holding that the non-dependent parents of non-seamen killed in territorial waters could not recover loss of society damages under general maritime law); Miles v. Melrose, 882 F.2d 976, 989 (5th Cir. 1989) (holding that the non-dependent parent of a seaman killed in territorial waters could not recover loss of society damages under general maritime law), *aff'd sub nom.* Miles v. Apex Marine Corp., 498 U.S. 19 (1990). *See also* Zicherman v. Korean Air Lines Co., Ltd., No. 93-7490, 1994 WL 685690, at *3-4 (2d Cir. Dec. 5, 1994); Air Disaster at Lockerbie Scotland on December 21, 1988, 37 F.3d 804, 828-30 (2d Cir. 1994) (both holding that federal maritime law does not allow recovery for loss of society to non-dependent family members). *Cf.* Walker v. Braus, 861 F. Supp. 527, 531-38 (E.D. La. 1994) (holding by direction of the Fifth Circuit that the family members of a non-seaman killed in territorial waters could not recover loss of society damages under general maritime law), *remand before decision*, 995 F.2d 77 (5th Cir. 1993).

11. *Earles II*, 26 F.3d at 916-17.

12. *Id.* at 917. Maritime wrongful death law is governed by three separate causes of action, two statutory, and one court-made: (1) the Jones Act, 46 U.S.C. app. § 688 (1988); (2) the Death on the High Seas Act, "DOHSA," 46 U.S.C. app. §§ 761-68 (1988); and (3) a "*Moragne* action," Moragne v. States Marine Lines, 398 U.S. 375 (1970) (creating a court-made wrongful death action in the general maritime law). *See generally* SCHOENBAUM, *supra* note 3, § 7-1 at 235-36 (noting that a "crazy quilt pattern" of wrongful death actions is recognized in admiralty jurisdiction).

The Ninth Circuit's holding extends loss of society damages under general maritime law to the non-financially dependent parents of *non-seamen* who perish within territorial waters, despite a recent United States Supreme Court decision[13] which affirmed the importance of uniformity[14] by declining to award loss of society damages to the non-dependent mother of a *seaman* killed in territorial waters.[15]

This comment compares the Ninth Circuit's holding with the approaches other courts have taken regarding loss of society damages and the dependency rule for awarding such recovery in maritime wrongful death actions. This comment concludes that, although the Ninth Circuit's decision was an empathetic attempt at developing the law of maritime damages, the holding's glaring conflict with the spirit of the maritime remedial statutory scheme is exemplary of a growing problem in maritime law. Specifically, as judges struggle to keep the rules of admiralty current with common law developments outside the maritime context, the separation of judge-made doctrine from Congressional policy widens within admiralty jurisdiction, thereby creating new and greater anomalies in admiralty uniformity, more uncertainty for admiralty practitioners, and unfair results for some maritime tort victims.[16]

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13. Miles v. Apex Marine Corp., 498 U.S. 19, 30-33 (1990) (holding that the parent of a seaman killed in territorial waters could not recover loss of society damages).

14. The seminal decision explaining the need for uniformity in general maritime law stressed that application of this principal rises to the level of a Constitutional mandate. *See* The Lottawanna, 88 U.S. (21 Wall.) 558 (1874). In *The Lottawanna*, the Supreme Court announced:

> One thing, however is unquestionable: The Constitution must have referred to a system of law co-extensive with and operating uniformly in the whole country. It certainly could not have been the intent to place the Rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States.

The Lottawanna, 88 U.S. (21 Wall.) at 575. *See* U.S. CONST. art. III, § 2, cl. 1.

15. *Earles II*, 26 F.3d at 917; *see Miles*, 498 U.S. at 30-33.

16. *See* Lizabeth L. Burrell, *Current Problems in Maritime Uniformity*, 5 U.S.F. MAR L.J. 67, 82 (1992) (noting that when mainstream developments are incorporated into maritime law creating persistent conflicts in uniformity and clashes with settled admiralty tenets, the Supreme Court must lead the way).

II. FACTS AND PROCEDURAL HISTORY

On October 28, 1984, at approximately 3:00 a.m., a twenty-foot long jet powered ski boat, the WHISKEY RUNNER, entered a channel designated for recreational boats inside the United States Naval Weapons Station at Seal Beach, Huntington Harbor, California.[17] Nine people were aboard the WHISKEY RUNNER when it entered the channel traveling between 40 and 45 miles per hour.[18] Seconds later, the boat headed outside the marked channel and struck "Oscar 8,"[19] an unilluminated Navy mooring buoy.[20] The WHISKEY RUNNER sank immediately.[21] Five of the passengers died on impact; the remaining four occupants sustained personal injuries.[22] One of the survivors was Virl Earles, the operator of the WHISKEY RUNNER.[23] A blood alcohol test administered to Virl Earles several hours after the incident revealed a blood alcohol level of .11%.[24]

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17. Earles v. United States ("Earles I"), 935 F.2d 1028, 1029-30 (9th Cir. 1991) (per Leavy, J, with whom Browning, J., joined; Pregerson, J., dissenting), *appeal after remand*, Sutton v. Earles ("Earles II"), 26 F.3d 903 (9th Cir. 1994) (per Canby, J.; the other panel members were Tang, J., and Beezer, J.).

18. *Earles I*, 935 F.2d at 1030. The local speed limit was between 3 and 8 knots. *Id.* A knot is the unit of speed used in navigation which is the rate of one nautical mile per hour. 1 NATHANIEL BOWDITCH, AMERICAN PRACTICAL NAVIGATOR 63 (Defense Mapping Agency Hydrographic/Topographic Center, 1984) (1802). One nautical mile equals 6,076 ft., and one statute mile is 5,280 ft., therefore, the speed limit in the harbor was roughly 5 miles per hour. *See id.* Since the WHISKEY RUNNER was traveling between 40 and 45 miles per hour, the boat was moving at approximately 37 knots. *See id.* Therefore, the WHISKEY RUNNER was traveling at an excessive speed at the time of the allision. *Earles I*, 935 F.2d at 1030; *see supra* note 8 for a definition of allision.

19. *Earles I*, 935 F.2d at 1030. "Oscar 8," the mooring buoy the WHISKEY RUNNER allided with, was a steel white Navy buoy twelve feet in diameter and riding approximately five feet above the water. Opening brief for Appellee at 6-7, Sutton v. Earles ("Earles II"), 26 F.3d 903 (9th Cir. 1994) (No. 92-55548). The buoy was located approximately 300 yards inside the harbor and about 250 feet outside the navigation channel. *Id.* One of eight identical buoys placed outside of the channel and used to moor ammunition barges, Oscar 8 had no light, beacon, or reflective tape. *Id.*

20. *Earles I*, 935 F.2d at 1030.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* Although a blood alcohol content of .11% is in excess of the amount at which an automobile driver would be considered legally drunk in most states, at the time of this accident, no such law applied to the operator of a vessel. *See* Opening brief for Appellant at 9, *Earles II* (No. 92-55548). However, as a result of

Actions were brought on behalf of the five decedents under the Suits in Admiralty Act[25] (hereinafter "SIAA") against the United States Government for negligence.[26] The plaintiffs alleged that the Government failed to warn of an obstruction to navigation because Oscar 8 was not illuminated and the speed limit inside the harbor was not adequately posted.[27] The United States impleaded Virl Earles, pursuant to Federal Rules of Civil Procedure, Rule 14(c),[28] alleging that he was the sole cause of the accident and was therefore directly liable to the petitioners.[29] The five consolidated cases for wrongful death, against the United States and Mr. Earles, were bifurcated for hearing on the issues of liability and damages.[30]

The trial court ruled that the Government and Mr. Earles

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this tragic occurrence, Virl Earles was convicted in the West Orange County Municipal Court on five counts of manslaughter and was sentenced to prison. *See* Proposed Findings of Fact and Conclusions of Law for Appellant at 11, *Earles II* (No. 92-55548).

25. 46 U.S.C. §§ 741-52 (1988). The Suits in Admiralty Act (hereinafter SIAA) is a limited waiver of sovereign immunity whereby the federal government consents to negligence liability in admiralty "in cases where . . . if a private person or property were involved, a proceeding in admiralty could be maintained." 46 U.S.C. § 742. To illustrate the scope of the *Earles II* decision, it should be noted that the government's liability arose as a *private party's* would, i.e., the existence of a duty by the United States in *Earles II* is not due to its sovereignty. *See id.* (emphasis added). The *Earles II* damages rule would likely apply under similar facts to a corporation that maintains private buoys or other such maritime structures as part of its commercial operations, or a citizen who owns a dock that extends over navigable waters. *See* Perlman v. Valdes, 575 So. 2d 216, 217 (Fla. Dist. Ct. App. 1990) (parents of woman who died from injuries sustained when speedboat in which she was a passenger struck unlighted, unused concrete pier brought maritime wrongful death action against the pier owner, a real estate trust); Complaint of Nobles, 842 F. Supp. 1430, 1432 (N.D. Fla. 1993) (involving wrongful death of a ski boat passenger who died when the boat he was aboard struck a privately owned boathouse).

26. *Earles II*, 26 F.3d at 906.

27. *See id.*

28. Federal Rules of Civil Procedure, Rule 14(c), permits a defendant in admiralty and maritime jurisdiction to act as a third-party plaintiff for the purpose of impleading a third-party defendant who may be partially or fully liable directly to the original plaintiff. FED. R. CIV. P. 14(c). The practice is unique to maritime law in that the original action proceeds "as if the plaintiff had commenced [the action] against the third-party defendant." *Id.* Thus, the third-party defendant in admiralty jurisdiction may be directly liable to the original plaintiff, not merely liable for indemnity to the third-party plaintiff as is normally the practice. *Id.*

29. *Earles I*, 935 F.2d at 1030; Opening brief for Appellant at 2, *Earles II* (No. 92-55548).

30. *Earles I*, 935 F.2d at 1030.

were equally responsible for the accident.[31] After the trial on wrongful death damages,[32] judgment was entered awarding the non-dependent parents of the decedents substantial recovery for loss of society.[33] The Government appealed the issues of liability and damages.[34]

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31. *Earles II*, 26 F.3d at 907. This case was before the Ninth Circuit on appeal from the United States District Court for the Central District of California. James M. Ideman, District Judge, Presiding. Opening brief for Appellant at 2-3, *Earles II* (No. 92-55548). Argued and submitted March 17, 1988 in Los Angeles, California. *Id.*

32. A damages trial was held in the district court on April 12th and 13th, 1988. Opening brief for Appellant at 3, *Earles II* (No. 92-55548).

33. *Earles II*, 26 F.3d at 915. In addition to amounts awarded for loss of support, total damages for loss of society awarded by the district court were $1,089,900.00, or 49% of the entire judgment, $2,206,091.19. *See* Opening brief for Appellant at 5, *Earles II* (No. 92-55548); Proposed Findings of Fact and Conclusions of Law for Appellant at 7-11, *Earles II* (No. 92-55548).

34. *Earles II*, 26 F.2d at 906. Although the District Court found the government and Mr. Earles equally at fault, because there was no likelihood of recovery from Mr. Earles (above that awarded as off-set from his award against the government), the beneficiaries' only effort to pursue their remedies was against the government which was held jointly and severally liable for the total judgment of $2,206,091.19. Opening brief for Appellant at 5, *Earles II* (No. 92-55548). Thus, the government alone appealed. *Earles I*, 935 F.2d at 1030. The government contested liability by arguing that the Discretionary Function Exception that is specifically enunciated in the Federal Torts Claim Act also applied to the SIAA. *Earles II*, 26 F.3d at 906; *Earles I*, 935 F.2d at 1030-32. The Federal Torts Claim Act (hereinafter "FTCA") is a limited waiver of sovereign immunity whereby the federal government consents to negligence liability for damage or loss of property, or negligence or death arising from the negligent wrongful acts or omissions of all federal employees acting within the scope of their employment. 28 U.S.C. §§ 2679(b), 2679(d) (1988). Essentially, the FTCA is to land-based law, as the SIAA is to admiralty and maritime law, however, the SIAA does not expressly immunize the government for the exercise of discretionary functions. *Earles I*, 935 F.2d at 1031 (quoting Sheridan Transp. Co. v. United States, 897 F.2d 795, 798 n.2 (5th Cir. 1990)). The Discretionary Function Exception is a qualification to the general waiver of sovereign immunity granted by the Federal Torts Claim Act. 28 U.S.C. § 2680(a) (1988). The statutory exception states, in pertinent part, that a claim cannot be maintained against the United States when the claim is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id.* The exception is grounded in concern for keeping separation of powers intact when sovereign immunity is waived, because when the government is sued, government conduct necessarily comes under judicial scrutiny. Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1021-22 (9th Cir. 1989). Thus, the legislative rationale for the exception is that "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Earles I*, 935 F.2d at 1031 (quoting United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797, 813-14 (1984)). The Ninth Circuit in *Earles I* agreed with the government on the application of the Discre-

The Ninth Circuit considered the appeal in *Earles v. United States*[35] (*"Earles I"*) and remanded on the issue of government liability without reaching the question of damages.[36] On remand, the district court amended its original judgment, once more finding the United States liable.[37] Therefore, in *Earles II* the United States renewed its appeal on the issues of liability and damages, asserting that consistent with the spirit of a recent Supreme Court decision[38] the non-dependent parents of non-seamen could not recover for loss of society.[39]

III. BACKGROUND

Loss of society damages are those damages in a maritime wrongful death action which compensate the decedent's beneficiary for deprivation of the decedent's continued existence, including: love, affection, care, attention, companionship, comfort, and protection.[40] Loss of society damages are a non-pecuniary[41] element of maritime wrongful death recovery.[42] The

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tionary Function Exception to the SIAA. *Earles I*, 935 F.2d at 1032; *see also Earles II*, 26 F.3d at 906 (noting that every circuit but one that has considered the question has read the exception into the SIAA). Accordingly, the Ninth Circuit vacated the district court's finding of liability and remanded for a determination of whether the Navy's decisions, including, not to adequately post a speed limit and not to illuminate Oscar 8, were discretionary policy acts that fell within the Discretionary Function Exception barring recovery. *Earles I*, 935 F.2d at 1032; *see also Earles II*, 26 F.3d at 906.

35. Earles v. United States ("Earles I"), 935 F.2d 1028, 1029-30 (9th Cir. 1991), *appeal after remand*, Sutton v. Earles ("Earles II"), 26 F.3d 903 (9th Cir. 1994).

36. *Earles I*, 935 F.2d at 1032.

37. *Earles II*, 26 F.3d at 906 n.1.

38. Miles v. Apex Marine Corp., 498 U.S. 19, 30-33 (1990) (holding that the parent of a seaman killed in territorial waters could not recover loss of society damages under general maritime law).

39. *Earles II*, 26 F.3d at 914-15.

40. Sea-Land Services v. Gaudet, 414 U.S. 573, 585 (1974).

41. Pecuniary damages are recovery for loss that can be estimated and compensated in money. BLACK'S LAW DICTIONARY 392 (6th ed. 1990). Pecuniary damages may include amounts for depravation, injury, loss of rights, or other loss that can be calculated or recompensed in money. *Id.* Admiralty courts, however, generally hold that pecuniary damages are that amount for loss of money or salable property by the plaintiff for which compensation is awarded. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 32-33 (1990). Thus, admiralty courts hold that under the general maritime law, loss of society damages are *non*-pecuniary in nature. *Gaudet*, 414 U.S. at 583-91 (emphasis added).

42. *Gaudet*, 414 U.S. at 585 n.17.

doctrine entered admiralty through the case of *Sea-Land Services v. Gaudet*,[43] a longshoreman case,[44] wherein the Supreme Court reasoned that extending elements of damages for non-pecuniary loss would align maritime wrongful death law with the majority of state wrongful death statutes that at that time allowed recovery for non-pecuniary loss.[45] Furthermore, the Court reasoned that its rationale was in accord with the well settled admiralty tenet of "special solicitude."[46]

Special solicitude is an ancient tenet of the maritime law of seamen based on both humanitarian and economic policy.[47] Special solicitude treats seamen as the "wards of admiralty," protecting them from the harsh conditions of their employment, and in so doing, encourages seagoing to the ultimate benefit of commerce.[48] Courts applying the doctrine of special solicitude must balance it against another maritime law principle, that of uniformity.[49]

The doctrine of uniformity is the fundamental constitution-

43. 414 U.S. 573, 585-90 (1974) (holding the spouse of a longshoreman killed in territorial waters could recover loss of society damages under general maritime law).

44. At the time of this case, longshoremen, under the doctrine of "*Sieracki* seaman," were extended protection under the general maritime law pursuant to the same heightened standard of liability seamen derived from "special solicitude." Seas Shipping Co. v. Sieracki, 328 U.S. at 85, 99 (1946), *reh'g denied*, 328 U.S. 878 (1946). A "*Sieracki* seaman" was granted seaman-type privileges, because courts reasoned, in their employment, longshoremen face analogous hazards as do seamen and, like seamen, perform a function essential to maritime service aboard ships. *Id.* Today however, that doctrine has been abolished by the 1972 amendments to the Longshore and Harbor Workers' Compensation Act, which gives maritime shore workers, such as longshoremen, federal statutory remedies. 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 901-50 (1988)).

45. *Gaudet*, 414 U.S. at 587-88.

46. *Id.* at 588.

47. Harden v. Gordon, 11 F.Cas. 480, 483 (C.C.D. Me. 1823) (noting that the principle of "special solicitude" is based on both protecting the generally improvident class of seamen and preserving it for the commercial service of the nation, and moreover that the doctrine could be traced back to the medieval sea code, *the Rolls of Oleron*). *See also Gaudet*, 414 U.S. at 577; Moragne v. States Marine Lines, 398 U.S. 375, 386-88 (1970); *see supra* note 5 for a discussion on special solicitude.

48. *Harden*, 11 F.Cas. at 483.

49. *See* Lizabeth L. Burrell, *Current Problems in Maritime Uniformity*, 5 U.S.F. MAR L.J. 67, 165 (1992) (noting that without uniformity, maritime practice would be unmanageable).

al principle defining federal admiralty jurisdiction, while entrusting to the district courts the power to develop maritime law in harmony with each other.[50] To ensure uniformity of law the Constitution places admiralty and maritime cases in federal court jurisdiction.[51] Application of the uniformity principle assures that maritime rules of decision are developed consistently throughout the nation so that federal policy regarding marine transportation is implemented on a federal scale, thereby complementing the federal government's power to regulate commerce.[52] Uniformity is especially important to admiralty practitioners because it assures reliability and predictability of the governing law regardless of where a client's vessel travels or where a maritime tort arises.[53] Federal control of maritime law is thus important because otherwise the transient nature of vessel operations and the remote sites of maritime ventures would frustrate the constitutional mandate.[54] Because maritime wrongful death recovery developed in reaction to immediate concerns, various causes of actions exist that incorporate liabilities or impose damages differently from each other, producing a scheme of recovery wherein the constitutional principle is threatened.[55]

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50. *See* U.S. CONST. art. III, § 2, cl. 1; *see also The Lottawanna*, 88 U.S. (21 Wall.) at 573-75; Lizabeth L. Burrell, *Current Problems in Maritime Uniformity*, 5 U.S.F. MAR L.J. 67, 88 (1992) (noting that uniformity is at the heart of the district courts' grant of admiralty and maritime jurisdiction); *supra* note 14 for a discussion on uniformity.

It should be noted that although the general maritime law is federal law, state courts have concurrent jurisdiction over some maritime actions and thus may apply federal maritime rules of decision (the "general maritime law"), when appropriate, under the "saving to suitors" clause of the Judiciary Act of 1789 as codified today in 28 U.S.C. § 1333. 28 U.S.C. § 1333 (1988). A state court must apply general maritime law rules when in conflict with state law in order to preserve uniformity of the general maritime law despite its application across many jurisdictional forums. Southern Pacific v. Jensen, 244 U.S. 205, 216 (1917); *see also* Nelson v. United States, 639 F.2d 469 (9th Cir. 1980).

51. U.S. CONST. art. III, § 2, cl. 1.

52. *See* U.S. CONST. art. I, § 8, cl. 3. This clause, commonly referred to as the "Commerce Clause," allocates the power to regulate commerce to the federal government. *See The Lottawanna*, 88 U.S. (21 Wall.) at 573-75; *see also Jensen*, 244 U.S. at 216.

53. *See* Lizabeth L. Burrell, *Current Problems in Maritime Uniformity*, 5 U.S.F. MAR L.J. 67, 165 (1992).

54. *Id.*

55. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 26-27 (1990) (noting that admiralty courts that "supplement" statutory remedies in maritime wrongful death actions must to so to achieve uniform vindication of national policy); *see also* Mobil

Maritime wrongful death law is principally governed by three separate causes of action, two statutory, and one court-made.[56] First, under the Jones Act, beneficiaries may recover for maritime wrongful death of a seaman from the seaman's employer regardless of where the seaman's death occurred.[57] Second, recovery for wrongful death occurring further than three nautical miles from shore is governed by The Death on the High Seas Act (hereinafter "DOHSA").[58] Third, claims made for wrongful death of non-seamen in state territorial waters (within three nautical miles from shore), may be brought under the general maritime law in what is commonly known as a "*Moragne* action."[59]

A. THE DEATH ON THE HIGH SEAS ACT AND THE JONES ACT: FEDERAL STATUTORY CAUSES OF ACTION FOR MARITIME WRONGFUL DEATH

In 1886, the Supreme Court decided *The Harrisburg*,[60] which incorporated into American maritime jurisprudence the common law rule that "a tort action dies with its possessor."[61] The Court in *The Harrisburg* held that, absent a statutory provision, no cause of action for wrongful death existed in general maritime law.[62] Consistent with *The Harrisburg*, but in an effort to mitigate its harsh rule, the Supreme Court in 1907 decided *The Hamilton*.[63] In *The Hamilton*, the Court reasoned that, because no federal statute provided a remedy for maritime wrongful death at that time, general maritime

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Oil v. Higginbotham, 436 U.S. 618, 625 (1978) (noting that since Congress has never enacted a comprehensive maritime code, courts that award maritime wrongful death damages must do so in a way that preserves the uniformity of maritime law). *See generally* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 7-1, at 235 (1987 & Supp. 1992) (noting "a crazy quilt pattern" of wrongful death actions is recognized in admiralty that was "jerry-built" on an ad-hoc basis over many years of response to immediate concerns).

56. *See supra* note 12.

57. 41 Stat. 988, 1007 (1920) (codified as amended at 46 U.S.C. app. § 688 (1988)).

58. 41 Stat. 537 (1920) (codified at 46 U.S.C. app. §§ 761-68 (1988)).

59. Moragne v. States Marine Lines, 398 U.S. 375 (1970).

60. 119 U.S. 199 (1886), *overruled by* Moragne v. States Marine Lines, 398 U.S. 375 (1970).

61. The Harrisburg, 119 U.S. 199, 204-05 (1886).

62. *Id.* at 213.

63. 207 U.S. 398 (1907).

law could borrow state wrongful death statutes to provide recovery to beneficiaries of maritime fatalities.[64] However, two limitations were placed on beneficiaries who asserted maritime wrongful death claims after *The Hamilton*: (1) not all states' wrongful death statutes contemplated maritime fatalities when they were enacted, and therefore, some states did not create a right of action; and (2) even if the state created a claim, if the maritime fatality did not take place within state territorial waters where the statute had jurisdictional effect, no recovery was available.[65] Therefore, after *The Harrisburg* and *The Hamilton*, recovery for wrongful death in general maritime law was piecemeal in territorial waters, and non-existent on the high seas.[66]

In 1920 Congress enacted DOHSA[67] to preempt *The Harrisburg* and create a negligence based wrongful death action for beneficiaries of "anyone" killed on the high seas.[68] In the same year, Congress enacted The Jones Act,[69] which also created a maritime negligence based wrongful death action, but only for the beneficiaries of a "seaman."[70]

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64. The Hamilton, 207 U.S. 398, 403-06 (1907).

65. *See* Moragne v. States Marine Lines, 398 U.S. 375, 393 n.10. (1970); *see supra* note 6 and accompanying text for a definition of territorial waters.

66. *Moragne*, 398 U.S. 393 n.10; *see* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 7-1, at 235 (1987 & Supp. 1992); *see also* GRANT GILMORE AND CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY, § 6-29, at 359 (2nd ed. 1975).

67. 41 Stat. 537 (1920) (codified at 46 U.S.C. app. §§ 761-68 (1988)).

68. *Id.* The Death on the High Seas Act [hereinafter "DOHSA"] states, in pertinent part:

> Whenever the death of *a person* shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, . . . the personal representatives of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty. . . .

Id. (emphasis added); *see supra* note 3 for an explanation of the preemptive effect Congressional enactments have on the general maritime law.

69. 41 Stat. 988, 1007 (1920) (codified as amended at 46 U.S.C. app. § 688 (1988)).

70. *Id.* When drafting the Jones Act, Congress did not formulate a unique cause of action for seamen, but merely adopted, wholesale, the wrongful death action that existed for railroad employees under the Federal Employers' Liability Acts, 33 U.S.C. §§ 51-59 [hereinafter "FELA"]. Miles v. Apex Marine Corp., 498 U.S. 19, 33 (1990). The Jones Act states, in pertinent part: "[A]ll statutes of the United States modifying or extending the common-law right or remedy in cases of . . . [wrongful death] to railroad employees shall apply. . . ." 46 U.S.C. app. §

With regard to wrongful death actions, the Jones Act differs from DOHSA in three major respects.[71] First, beneficiaries asserting a Jones Act claim must establish seaman status of the decedent as a prerequisite for recovery, while DOHSA covers wrongful death regardless of status.[72] Second, Jones Act beneficiaries recover for wrongful death whether the tort occurred in territorial waters or on the high seas, while DOHSA governs only on the high seas.[73] Third, DOHSA allows recovery for financial loss to all relatives who were dependent on the decedent, while under the Jones Act's schedule of beneficiaries, claimants take by class.[74] When a prior class has already recovered, members of a subsequent class are precluded from recovering.[75] Therefore, in the case where a member of a prior class has already recovered under the Jones Act, the member of a subsequent class may be denied recovery, even if financially dependent.[76] Notwithstanding the inconsistencies between statutes, the intent behind each was similar, to abrogate the harsh results of *The Harrisburg*, and thereby affect a federal policy of encouraging recovery for maritime wrongful death.[77] However, maritime wrongful death recovery under both federal maritime remedial statutes is limited to

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688 (1988). *See supra* note 5 for a discussion on seaman status.

71. *See* 46 U.S.C. app. § 688 (1988); 46 U.S.C. app. §§ 761-78 (1988). *See also* GILMORE AND BLACK, *supra* note 66, §§ 6-29 to 6-31.

72. *See* 46 U.S.C. app. § 688 (1988); 46 U.S.C. app. §§ 761-68 (1988). *See supra* note 5 for a discussion on seaman status.

73. *See* 46 U.S.C. app. § 688 (1988); 46 U.S.C. app. §§ 761-68 (1988).

74. 46 U.S.C. app. § 688 (1988); 46 U.S.C. app. §§ 761-68 (1988).

Section 761 of DOHSA states, in pertinent part: "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative. . . ." 46 U.S.C. app. § 761.

Section 51 of FELA, which is incorporated into the Jones Act by reference in 46 U.S.C. app. § 688, states in pertinent part: "for the benefit of the surviving widow or husband and children of such employee; and, *if none*, then of such employees parents; and, *if none*, then of the next of kin *dependent* upon such employee. . . ." 45 U.S.C. § 51 (1988) (emphasis added). Therefore, in the case where a decedent seaman's spouse recovers under the Jones Act, the seaman's parent(s), even if dependent, are barred from recovering. *See* GILMORE AND BLACK, *supra* note 66, § 6-30, at 360-62 (2nd ed. 1975).

75. 46 U.S.C. app. § 688 (1988). *See* GILMORE AND BLACK, *supra* note 66, § 6-30, at 360-62 (2nd ed. 1975).

76. 46 U.S.C. app. § 688 (1988). *See* GILMORE AND BLACK, *supra* note 66, § 6-30, at 360-62 (2nd ed. 1975).

77. *Earles II*, 26 F.3d at 914. *See* 41 Stat. 537 (1920) (codified at 46 U.S.C. app. §§ 761-68 (1988)); 41 Stat. 988, 1007 (1920) (codified as amended at 46 U.S.C. app. § 688 (1988)).

damages for pecuniary loss.[78]

In enacting the maritime remedial statutory scheme, Congress reasoned that although recovery for wrongful death in territorial waters might still vary among jurisdictions, state statutes provided adequate remedies to non-seamen, and thus Congress did not extend coverage to non-seamen under DOHSA, into territorial waters.[79] The Jones Act, however, was also enacted as part of the Merchant Marine Act of 1920,[80] which had the purpose of promoting a strong and viable American merchant marine to facilitate interstate and foreign commerce as well as to respond to national emergencies.[81] Thus, Congress covered seamen both on the high seas and in state territorial waters, reasoning that seamen were a class of industrial workers entitled to "special solicitude" for the harsh conditions of their employment, and that protecting seamen from the incomplete recovery afforded under state law

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78. Section 762 of DOHSA states, in pertinent part: "The recovery in such suit shall be a fair and just compensation for the *pecuniary loss* sustained by the persons for whose benefit the suit is brought. . . ." 46 U.S.C. app. § 762 (emphasis added). In contrast, the Jones Act's limitation on pecuniary damages is not explicit, but incorporated by legislative intent from FELA, on which it is based. *Miles*, 498 U.S. 19, 33 (1990). In turn, FELA is based on the original wrongful death statute, Lord Campbell's Act, which, as a well settled judicial matter, limits recovery to pecuniary damages only. *Id.*; see *supra* note 41 for a definition of pecuniary damages.

79. H.R. REP. NO. 10378, 66th Cong., 2nd Sess. (1920).

80. 41 Stat. 988 (1920). The maritime injury and wrongful death provision commonly known as the Jones Act is found in the miscellaneous provisions section of the Merchant Marine Act of 1920 which collectively is titled "An Act To Provide For The Promotion And Maintenance Of The American Merchant Marine. . . ." *Id.* The first provision of the Act states:

> [I]t is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped [personnel] and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval . . . auxiliary in time of war or national emergency . . . and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of . . . a merchant marine. . . .

Id.

81. 41 Stat. 988 (1920); see *supra* notes 5, 47-48 and accompanying text for a discussion of the dual humanitarian and economic policy underlying this legislation; *see also* GILMORE AND BLACK, *supra* note 66, § 11-5, at 965-66 (noting provisions of the act were designed to "foster shipping").

would be consistent with the principle of special solicitude and encourage employment at sea.[82]

B. THE DOCTRINE OF UNSEAWORTHINESS: GENERAL MARITIME LAW THEORY OF LIABILITY WITHOUT FAULT

Along with Congressional enactment of the federal maritime wrongful death statutes, the Supreme Court has developed an alternative theory of liability under general maritime law to further the policy of recovery for maritime torts, the doctrine of unseaworthiness.[83] The doctrine of unseaworthiness is similar to strict liability,[84] and therefore favors recovery.[85] In the years following enactment of the maritime remedial statutory scheme, it became common practice in maritime wrongful death cases for beneficiaries of a seaman to join their Jones Act negligence claims with either a state wrongful death claim based on the theory of unseaworthiness, if the death occurred in state territorial waters, or a DOHSA claim founded on unseaworthiness, if the death occurred on the high seas.[86] However, in 1964, the Supreme Court in *Gillespie v. United*

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82. H.R. REP. NO. 10378, 66th Cong., 2nd Sess. (1920).

83. *See* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960) (holding that under general maritime law the owner of a vessel is held to an implied warranty that the vessel is reasonably fit for its intended use, and that that duty is independent of the shipowner's duty of reasonable care under the Jones Act); *see also* Seas Shipping Co. v. Sieracki, 328 U.S 85, 94 (1946) (holding that unseaworthiness may be maintained in a warranty claim and is a species of liability without fault), *reh'g denied*, 328 U.S. 878 (1946); Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 340 (1955) (holding that the warranty of seaworthiness extends to unfit crewmembers analogizing that crewmembers are equally as vital to safety aboard ship as a seaworthy hull); Mahnich v. Southern S.S. Co., 321 U.S. 96, 101-02 (1944) (holding that the shipowner's duty of seaworthiness is absolute and nondelegable). The doctrine of unseaworthiness has its incubus in the proposition that shipowners are liable for seamen's injuries that are caused by the unseaworthiness of their vessel, or the failure to keep their vessel supplied with the proper fixtures. *See* The Osceola, 189 U.S. 158 (1903).

84. In tort law, strict liability is liability without fault that is imposed on one who engages is an activity that involves inherent risk of injury. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 75, at 534-38 (5th ed. 1984). The rationale of the tort law of strict liability is to discourage socially dangerous behavior, while not entirely prohibiting any social benefit such behavior may have. *Id.* The maritime law warranty of seaworthiness serves to discourage shipowners from exacerbating the inherent risks of seagoing, while not prohibiting the social benefit of marine operations. *See Sieracki*, 328 U.S. at 108.

85. *See Sieracki*, 328 U.S. at 108.

86. *See* Moragne v. States Marine Lines, 398 U.S. 375, 399-401 (1970).

States Steel Corp.[87] held that the Jones Act was the exclusive remedy for a seaman's beneficiaries in territorial waters.[88] The Court reasoned that since the Jones Act provided a remedy in territorial waters, it manifested federal maritime policy, and therefore it was paramount over state wrongful death statutes under the constitutional preference for uniformity.[89] After *Gillespie*, a seaman's beneficiaries were no longer able to bring state claims founded on unseaworthiness for wrongful death in territorial water under *The Hamilton*, but could maintain Jones Act claims founded solely on negligence.[90] Therefore, when coupled with the rule of *The Harrisburg*, *Gillespie* unintentionally effected a more generous remedy to the beneficiaries of some non-seamen than to the beneficiaries of seamen, for deaths occurring in territorial waters, in derogation of the basic maritime law principle that seamen are entitled to "special solicitude."[91] By 1970, the overlap of, and gap between, state wrongful death statutes and the federal maritime remedial statutory scheme, coupled with evolving doctrines in the general maritime law, such as the doctrine of unseaworthiness, caused anomalies in recovery for wrongful death which prompted the Supreme Court's attention.[92]

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87. 379 U.S. 148 (1964).

88. Gillespie v. United States Steel Corp., 379 U.S. 148, 155 (1964). *Cf.* Bodden v. American Offshore, Inc., 681 F.2d 319, 329 (5th Cir. 1982) (holding that DOHSA provides the exclusive wrongful death remedy for unseaworthiness when a seaman is killed outside state territorial waters).

89. *Gillespie*, 379 U.S. at 156; see *supra* notes 14, 49-55 and accompanying text for a discussion on uniformity.

90. *See Moragne*, 398 U.S. at 395-96 n.12. The Court in *Gillespie* decided that the siblings of a deceased seaman could not join a state wrongful death claim based on unseaworthiness with their mother's Jones Act wrongful death claim, reasoning that the siblings were precluded from recovering under the Jones Act's schedule of beneficiaries. *Gillespie*, 379 U.S. at 155.

91. *Moragne*, 398 U.S. at 396 n.12; see *supra* notes 5, 47-48 and accompanying text for a discussion on special solicitude.

92. *Moragne*, 398 U.S. at 395-97.

C. *MORAGNE* ACTION: GENERAL MARITIME LAW CAUSE OF ACTION FOR WRONGFUL DEATH

1. *Special Solicitude: The Humanitarian Policy of General Maritime Law*

In *Moragne v. States Marine Lines*,[93] the Supreme Court, in a unanimous decision, overturned *The Harrisburg* and established a cause of action for wrongful death in general maritime law.[94] In *Moragne*, the wife of a longshoreman[95] killed in territorial waters brought suit for wrongful death under Florida's wrongful death statute asserting negligence and unseaworthiness.[96] However, because the state wrongful death statute did not create an action based on unseaworthiness, and according to *The Harrisburg* no cause of action for negligent wrongful death was available when a non-seaman perished in territorial waters, the widow was denied relief by the trial court and, on appeal, by the Fifth Circuit.[97]

The Supreme Court based its decision to overrule *The Harrisburg*, and grant the widow relief, on two principles: (1) the need for uniformity in maritime law,[98] and (2) the aim to provide "special solicitude" to those who bring suit in admiralty.[99] The Court noted that after *Gillespie*, the beneficiaries of seamen were provided less protection than the beneficiaries of some non-seamen, and that its decision was designed to remedy this anomaly.[100]

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93. 398 U.S. 375 (1970).

94. Moragne v. States Marine Lines, 398 U.S. 375, 397-409 (1970).

95. See *supra* note 44 for a discussion on legal treatment of longshoremen.

96. *Moragne*, 398 U.S. at 376.

97. *Id.* at 376-77.

98. See *supra* notes 14, 49-55 and accompanying text for a discussion on uniformity.

99. *See Moragne*, 398 U.S. at 386-88, 401, 403. It should be noted that a species of "special solicitude" applied to the decedent-longshoreman in *Moragne*, because at the time of that case courts were extending the warranty of unseaworthiness to longshoremen under the "*Sieracki* seaman" doctrine. *See* Seas Shipping Co. v. Sieracki, 328 U.S. 85, 99 (1946), *reh'g denied*, 328 U.S. 878 (1946). The sweeping language of the holding in *Moragne*, however, *appeared* to extend "special solicitude" to "all those who brought suit in admiralty jurisdiction."

100. *Moragne*, 398 U.S. at 395-96 n.12. The Court explained:

> The . . . anomaly is that a true seaman — that is, a member of a ship's company, covered by the Jones Act —

After *Moragne*, recovery for maritime fatalities that occurred in state territorial waters was available to beneficiaries of non-seamen in federal court, as it had been for deaths that occurred on the high seas under DOHSA.[101] Moreover, recovery was consistent regardless of which state's territorial waters the tort occurred in, because federal courts applied the general maritime law uniformly.[102] To provide additional support for its departure from *stare decisis*, the Court reasoned that maritime law embodies civil law elements including unique equitable doctrines which grew apart from the common law and which supported a general maritime law death remedy.[103] Justice Harlan announced, "a 'special solicitude' for the welfare of those [persons] who undertook to venture upon hazardous and unpredictable sea voyages."[104]

The recoverable elements of damages and standing to recover in the general maritime wrongful death action ("*Moragne* action") were not decided.[105] The United States Government, as *amicus curiae*, advocated that DOHSA's schedule of beneficiaries should be adopted for the new cause of ac-

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> is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, does have such a remedy when allowed by a state statute.

Id.

101. *Id.* at 403.

102. *Id.* at 397-403.

103. *Id.* at 386-88. Justice Harlan announced:

> Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages.

Moragne, 398 U.S. at 386-88.

104. *Id.* Notwithstanding this broad language, Justice Harlan was apparently referring to seamen and, at that time, maritime shore-workers. *See* Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455, 460 (5th Cir. 1985), *reh'g denied*, 775 F.2d 301 (5th Cir. 1985), *cert. denied*, 479 U.S. 1019 (1986); *Sieracki*, 328 U.S. at 99-100.

105. *Moragne*, 398 U.S. at 405-08.

tion.[106] In addressing the Government's argument, Justice Harlan stated, "we think its final resolution should await further sifting through the lower courts in future litigation."[107] Despite its failure to resolve the damages issue, the Supreme Court suggested that the lower courts look to existing remedial legislation for analytical guidance.[108] Thus, the Supreme Court created the possibility that the new maritime wrongful death action, which was predicated in part on uniformity, might allow non-uniform recovery.[109]

In *Sea-Land Services v. Gaudet*,[110] the Supreme Court considered the scope and content of damages in a *Moragne* action.[111] In a five to four decision, the Court allowed the beneficiary of a longshoreman killed in state territorial waters to recover loss of society damages.[112] First the Court defined "loss of society" as "a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection."[113] The Court then reasoned that since the action was not controlled by statute, the Court was compelled to extend a remedy within general maritime law consistent with the guiding principle announced in *Moragne* which was to show "special solicitude" to the beneficiaries of those who are killed within admiralty jurisdiction.[114] The Court

106. *Id.* at 408.

107. *Id.*

108. *Id.*

109. *See id.*

110. 414 U.S. 573 (1974) (holding that loss of society damages are allowed as an element of recovery in a *Moragne* action for death of a longshoreman in territorial waters).

111. Sea-Land Services v. Gaudet, 414 U.S. 573, 585-90 (1974).

112. *Id.* at 585-90.

113. *Id.* at 585.

114. *Id.* at 587-88. Because the Court in *Gaudet* used broad language that did not limit loss of society to longshoremen in territorial waters only, many lower courts have interpreted the Court's language in *Gaudet* as extending "special solicitude" beyond seamen, to all who bring suit in admiralty jurisdiction. *See, e.g.*, Sutton v. Earles ("Earles II"), 26 F.3d 903, 917 (9th Cir. 1994). However, interpreting *Gaudet* to extend solicitude to non-seamen is arguably an over broad reading of that case because the decedent in *Gaudet* was not merely a "non-seaman," but was more precisely a "longshoreman," who at that time courts extended solicitude to as a "*Sieracki* seaman." *See Gaudet*, 414 U.S. at 585-90; *Sieracki*, 328 U.S. at 99. Thus, it can be asserted that *Gaudet* did not extend special solicitude beyond the realm of seamen, and therefore, the lower courts that have since done

recognized that its decision permitted recovery for non-pecuniary damages that were prohibited in statutory maritime cases, but reasoned that it was aligning the judge-made maritime wrongful death remedy with the majority trend in the United States which allowed loss of society by statute.[115] Thus, the Supreme Court, not constrained by legislation in either *Moragne* or *Gaudet*, appears to have favored incorporating current legal developments outside the realm of maritime law into admiralty jurisdiction despite departure from the principle of admiralty uniformity.[116] Nevertheless, later Supreme Court decisions took a tack favoring uniformity.[117]

2. *Uniformity: The Touchstone of General Maritime Law*

In *Mobil Oil v. Higginbotham*,[118] the Supreme Court emphasized the traditional desire of the admiralty courts for uniformity and noted the potential conflict between the judge-made *Moragne* remedy and the remedies provided by Congress in the federal maritime statutes.[119] In dealing with this conflict, the Court declined to award loss of society damages under general maritime law to the beneficiary of a longshoreman

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so, misapplied the Supreme Court's holding. *See* Walker v. Braus, 861 F.Supp. 527, 533 (E.D. La. 1994) (noting that *Miles* made it clear that general maritime law beneficiaries should receive no more and no less solicitude than Jones Act beneficiaries of seamen, and DOHSA beneficiaries of persons killed on the high seas, because courts have interpreted *Gaudet* too broadly by their reliance on the sweeping language of *Moragne*), *remand before decision*, 995 F.2d 77 (5th Cir. 1993).

115. *Gaudet*, 414 U.S. at 587-88 n.22.

116. *See Moragne*, 398 U.S. at 390 (noting that the Court's decision to create a federal maritime wrongful death action was based in part on the fact that the law of every state in the United States had evolved to the point where an action for wrongful death existed by statute); *Gaudet*, 414 U.S. at 587-88 (noting that allowing loss of society into the general maritime law, aligned the general maritime wrongful death remedy with the majority of state wrongful death statutes and the majority trend in the United States to allow such recovery).

117. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 26-27 (1990) (noting that admiralty courts that "supplement" statutory remedies in maritime wrongful death actions must do so to achieve uniform vindication of national policy); Mobil Oil v. Higginbotham, 436 U.S. 618, 625 (1978) (noting that since Congress has never enacted a comprehensive maritime code, courts that award maritime wrongful death damages must do so in a way that preserves the uniformity of maritime law).

118. 436 U.S. 618 (1978) (holding that loss of society damages are not a remedy in a *Moragne* action for a death that occurred on the high seas).

119. Mobil Oil v. Higginbotham, 436 U.S. 618, 622-26 (1978).

killed on the high seas.[120] Because DOHSA applied concurrently with a *Moragne* action, and DOHSA expressly limits damages to pecuniary loss, the Court reasoned it was precluded by Congressional intent from enhancing statutory recovery with the judge-made loss of society remedy.[121] The Court reasoned that, "[DOHSA] does not address every issue of wrongful-death law, . . . but when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless."[122] Addressing the anomaly that *Gaudet* allowed loss of society damages for a death in territorial waters while DOHSA did not allow non-pecuniary damages for a death on the high seas, the Court reasoned that loss of society awards under *Gaudet* were not a major threat to overall uniformity because their propriety could be scrutinized if they ever became a "substantial portion of the [beneficiary's] recovery."[123] The Supreme Court thus endorsed minor disparities between recovery available for wrongful death on the high seas and in territorial waters.[124]

In 1990, the Supreme Court employed the analytical framework of *Higginbotham* to decide *Miles v. Apex Marine Corp.*[125] Although in *Miles* the Supreme Court stressed the need for uniformity of recovery in maritime actions, the Court refused to overrule *Gaudet*.[126] The Court in *Miles* limited

120. *Id.* By the time *Higginbotham* was decided in 1978, the general maritime law doctrine which extended special solicitude to longshoremen had been abolished by the 1972 amendments to the Longshore and Harbor Workers' Compensation Act, which gives maritime shore workers, such as longshoremen, federal statutory remedies. 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 901-950 (1988)).

121. *Higginbotham*, 436 U.S. at 622-26.

122. *Id.* at 625.

123. *Id.* at 624 n.20; *see also*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 127, at 952 n.81 (5th ed. 1984) (noting that the Supreme Court has not yet decided the issue which its dicta in *Higginbotham* raised, namely whether awards for loss of society must be primarily symbolic rather than a substantial portion of recovery).

124. *See Higginbotham*, 436 U.S. at 624 n.20; *but cf.* KEETON, *supra* note 123 (noting that on occasion substantial awards for loss of society have been made in jurisdictions allowing such recovery in step with a general trend in American jurisprudence toward expanding tort liability).

125. 498 U.S. 19, 30-33 (1990) (holding that the parent of a seaman killed in territorial waters could not recover loss of society damages under general maritime law); *Higginbotham*, 436 U.S. at 622-26.

126. Miles v. Apex Marine Corp., 498 U.S. 19, 31-32 (1990).

Gaudet to its facts announcing, "[t]he holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen."[127] The Supreme Court decided *Miles* in an effort to restore uniformity to the maritime law of seamen.[128]

In *Miles* the Supreme Court held that loss of society is not among the elements of damages allowed to the beneficiaries of Jones Act seamen in wrongful death actions brought under general maritime law for unseaworthiness.[129] The Court denied loss of society to the non-dependent mother of a seaman knifed to death by a fellow crewmember onboard the ship on which he was employed while the ship lay alongside a berth in Washington State territorial waters.[130] The Court reasoned that recovery for non-pecuniary loss, such as loss of society, was foreclosed in a general maritime law wrongful death action for death of a seaman, because the Jones Act, which controls recovery for the judicially protected class of seamen, limits recovery to pecuniary loss.[131] The Court's reasoning emphasized that when a Jones Act claim is joined with an over-

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127. *Id.* at 31.

128. *Id.* at 37. Justice O'Connor wrote:

> Cognizant of the constitutional relationship between the courts and Congress, we today act in accordance with the uniform plan of maritime tort law Congress created in DOHSA and the Jones Act. We hold that there is a general maritime cause of action for the wrongful death of a seaman, but that damages recoverable in such an action do not include loss of society.

Id.

129. *Id.*; see *supra* notes 83-85 for a discussion of unseaworthiness.

130. *Miles*, 498 U.S. at 37. *See generally* Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 340 (1955) (holding that in an action against a shipowner for injuries resulting from an assault by a fellow crewmember, evidence that the assailant had such a savage disposition so as to endanger others working on the ship, that he had a propensity for violence greater than that of the ordinary person of that calling, and that a crew with assailant as a member was not competent to meet the contingencies of a sea voyage, is sufficient to support an action for breach of the warranty of seaworthiness).

131. *Miles*, 498 U.S. at 32-33. Although the Jones Act does not expressly limit damages to pecuniary loss, the Court reasoned, "When Congress passed the Jones Act, . . . [i]ncorporating FELA . . . Congress must have intended to incorporate [FELA's] pecuniary limitation on damages as well." *Id.* Herein the Court missed an opportunity to interpret FELA's pecuniary damages limitation out of the Jones Act, in line with the policy of special solicitude and evolving doctrines of tort recovery in the common law. *See id.*; *see supra* note 41 for a definition of pecuniary damages.

lapping claim under the general maritime law for loss of society, uniformity with legislative intent dictates that the Jones Act's pecuniary damages limitation preclude recovery for loss of society.[132] Thus, *Moragne-Gaudet* and *Higginbotham-Miles* demonstrate how the Supreme Court has struggled to provide both special solicitude and uniformity in admiralty while adhering to its own place in the constitutional scheme.[133]

3. *Doctrinal Conflict: Special Solicitude Versus Uniformity*

Moragne and *Gaudet* appear to stand for the proposition that the Court will sacrifice uniformity to keep pace with remedial developments outside of admiralty jurisdiction when not preempted by statute.[134] *Higginbotham* and *Miles* stand for the proposition that when a statute speaks directly to an issue, the Court will not sacrifice uniformity between the judge-made action and the Congressional enactment to allow relief beyond what Congress has dictated.[135] Therefore, as a result of the overlap of, and gap between, Congressional enactments and Supreme Court jurisprudence, the issue of whether to award loss of society damages to the beneficiaries of non-seamen killed in territorial waters when neither the Jones Act nor DOHSA apply has been left open.[136] Furthermore, the

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132. *Miles*, 498 U.S. at 26-30. The Court announced:

> We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from . . . death; Congress . . . [has] legislated extensively in [this area]. . . . In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress.

Id. at 27. Herein, Justice O'Connor appeared to abrogate the policy of special solicitude toward seamen in favor of the rather disingenuous notion that modern seamen need not look to the courts for protection, because Congress has already provided them protection by means of the Jones Act (including its well established pecuniary limitation). *See id.*

133. *See Miles*, 498 U.S. at 30-33; *see also Higginbotham*, 436 U.S. at 622-26; *Gaudet*, 414 U.S. at 585-90; *Moragne*, 398 U.S. at 397-409.

134. *See Gaudet*, 414 U.S. at 585-90; *Moragne*, 398 U.S. at 397-409.

135. *See Miles*, 498 U.S. at 30-33; *Higginbotham*, 436 U.S. at 622-26.

136. *See* Walker v. Braus, 861 F. Supp. 527, 535 (E.D. La. 1994) (holding by direction of the Fifth Circuit that *Miles'* emphasis on uniformity in maritime law

question remains after *Miles*, if loss of society damages are a remedy in a *Moragne* action, whether the parents of non-seamen are allowed to recover such damages without showing that they were financial dependents of the decedent.[137]

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compelled the decision that the dependent beneficiaries of a non-seaman killed in territorial waters could not recover loss of society damages under general maritime law), *remand before decision*, 995 F.2d 77 (5th Cir. 1993); Choat v. Kawasaki Motors Corp., 1994 A.M.C. 2626, 2640 (Ala. 1994) (holding that *Miles'* emphasis on uniformity in maritime law compelled the decision that the beneficiaries of a maritime fatality could not recover loss of society damages under general maritime law); Texaco Refining and Marketing, Inc. v. Estate of Dau Van Tran, 808 S.W.2d 61, 63 (Tex. 1991) (holding that *Miles'* emphasis on uniformity in maritime law compelled the decision that the beneficiaries of a maritime fatality could not recover loss of society damages under general maritime law). *But see Earles II*, 26 F.3d at 917 (9th Cir. 1994) (holding that because neither the Jones Act nor DOHSA applied, the court was free to affirm substantial awards for loss of society made to the non-dependent parents of non-seamen killed in territorial waters); *cf.* Emery v. Rock Island Boatworks, Inc., 847 F. Supp. 114, 116-18 (E.D. Ill. 1994) (holding that the spouse of a non-seaman injured in state waters may recover loss of society damages because neither the Jones Act nor DOHSA applied to preclude or limit damages). *See generally Gaudet*, 414 U.S. at 585-90 (granting lower courts sitting in admiralty the discretion to award loss of society damages on a case-by-case basis because, although such awards are non-pecuniary, they are measurable, and courts have demonstrated their ability to control excessive awards); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 8-3, at 476 (Practitioner's ed. 1994) (noting that *Miles,* by deciding the treatment of seamen and longshoremen, solved one discrepancy in uniformity to create another, the treatment of non-seamen).

137. Zicherman v. Korean Air Lines Co., Ltd., No. 93-7490, 1994 WL 685690, at *3-4 (2d Cir. Dec. 5, 1994) (holding that federal maritime law does not allow recovery for loss of society to non-dependent family members); Air Disaster at Lockerbie Scotland on December 21, 1988, 37 F.3d 804, 828-30 (2d Cir. 1994) (holding that federal maritime law does not allow recovery for loss of society to non-dependent family members); Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084, 1090-93 (2d Cir. 1993) (holding that the non-dependent parents of a non-seaman killed in territorial waters could not recover loss of society damages under general maritime law), *cert. denied*, 114 S.Ct. 1060 (1994); Anderson v. Whittaker Corp., 894 F.2d 804, 811-12 (6th Cir. 1990) (holding that the non-dependent parents of non-seamen killed in territorial waters could not recover loss of society damages under general maritime law); Miles v. Melrose, 882 F.2d 976, 989 (5th Cir. 1989) (holding that the non-dependent parent of a seaman killed in territorial waters could not recover loss of society damages under general maritime law), *aff'd sub nom.* Miles v. Apex Marine Corp., 498 U.S. 19 (1990); Cantore v. Blue Lagoon Water Sports, Inc., 799 F. Supp. 1151, 1152-55 (S.D. Fla. 1992) (holding that the parents of a non-seaman killed in territorial waters could recover loss of society damages under general maritime law only if they were financial dependents of the decedent); Lipworth v. Kawasaki Motors Corp. U.S.A., 592 So. 2d 1151, 1154-55 (Fla. Dist. Ct. App. 1992) (holding the non-dependent parents of non-seamen killed in territorial waters could not recover loss of society damages under general maritime law); Perlman v. Valdes, 575 So. 2d 216, 217 (Fla. Dist. Ct. App. 1990) (holding that the non-dependent parents of a non-seaman killed in

D. *MILES'* EFFECT ON THE ELEMENTS OF DAMAGES ALLOWED IN A GENERAL MARITIME WRONGFUL DEATH ACTION

Since *Miles*, lower courts have steered all points of the compass in an effort to apply the Supreme Court's dicta on non-pecuniary damages in cases dealing with non-seamen.[138] Some courts interpret *Miles* broadly, applying the uniformity principle to preclude loss of society in all general maritime cases except those authorized by the Supreme Court.[139] The

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territorial waters could not recover loss of society damages under general maritime law). *But see Earles II*, 26 F.3d at 917 (9th Cir. 1994) (holding that loss of society damages could be awarded to the parents of non-seamen killed in territorial waters regardless of dependency); *cf.* Randall v. Chevron, U.S.A., Inc., 13 F.3d 888, 903-04 (5th Cir. 1994) (holding that the dependent beneficiaries of a longshoreman killed in territorial waters could recover loss of society damages regardless of dependency); *Walker*, 861 F. Supp. at 538 (holding by direction of the Fifth Circuit that the dependent family members of a non-seaman killed in territorial waters could not recover loss of society damages under general maritime law regardless of dependency); *Choat*, 1994 A.M.C. at 2640 (holding that the non-dependent mother of a non-seaman killed in territorial waters could not recover loss of society damages regardless of dependency). *See generally*, SCHOENBAUM, *supra* note 136 § 8-3, at 476 n.36 (noting that because *Miles* was based on the preclusive effect of the Jones Act, loss of society could still be available to the beneficiaries of non-seamen, but that such awards were only allowed to parents who were financially dependent on the decedent).

138. *See* Steven K. Carr, *Living and Dying in the Post-*Miles *World: A Review of Compensatory and Punitive Damages Following* Miles v. Apex Marine Corp., 68 TUL. L. REV. 595, 598 n.19 (1994) (noting that, post-*Miles*, lower courts which ignore the Supreme Court's broader call for uniform remedies in maritime law are in the minority and risk the scrutiny of appellate review).

139. The Supreme Court in *Miles* declined to overrule *Gaudet*. Miles v. Apex Marine Corp., 498 U.S. 19, 31-32 (1990). However, in limiting *Gaudet* to its facts the Court stated: "[t]he holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen." *Id.* Some courts have connoted from reading this passage, together with the emphasis the Supreme Court placed on uniformity of recovery in *Miles*, that loss of society is implicitly prohibited in general maritime law to all but "longshoremen in territorial waters." *See* Walker v. Braus, 995 F.2d 77, 82 (5th Cir. 1993) (remanding with directions to the district court that to allow the widow of a non-seaman killed in territorial waters to recover loss of society "would directly contradict the policy of uniformity emphasized and relied on by the [Supreme] Court in *Miles*); *see also* Texaco Refining and Marketing, Inc. v. Estate of Dau Van Tran, 808 S.W.2d 61, 63 (Tex. 1991) (declining to award loss of society damages to the beneficiaries of a non-seaman killed in territorial waters, because he was not a longshoreman); *but see* Smallwood v. American Trading & Transp. Co., 839 F. Supp. 1377, 1384-85 (holding that loss of society damages could not be awarded to the beneficiaries of a longshoreman killed in territorial waters under the general maritime law because of *Miles'* limitation on *Gaudet* coupled with the 1972 amendments to the LHWCA); *cf.* Randall v. Chevron, U.S.A., Inc., 13 F.3d 888, 903 (5th Cir. 1994) (holding that even though loss of

Ninth Circuit and other courts limit *Miles* to seamen's cases, and hold that when not compelled by legislation, such as the Jones Act, the general maritime law requires awarding extended remedies to beneficiaries of non-seamen even if inconsistent with the limited recovery allowed to statutory suitors.[140] One interesting development born out of the courts' struggle is the application of a judicially-fashioned financial dependency requirement as a prerequisite for awarding parents of maritime fatalities loss of society damages.[141]

Only eight days before the *Earles II* opinion was published, the Alabama Supreme Court, applying general maritime law, declined to award recovery for loss of society to a non-dependent parent of a non-seaman killed in state territorial waters.[142] Since *Earles II*, the District Court for the Eastern District of Louisiana, deciding a case on remand from the Fifth Circuit, declined to follow *Earles II*, criticizing the Ninth Circuit's treatment of the damages issue.[143] The Ninth Cir-

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society damages were "severely limited" in *Miles*, under general maritime law, the beneficiaries of a longshoreman killed in territorial waters *could* recover loss of society damages pursuant to *Miles'* limitation on *Gaudet*); *Miles*, 498 U.S. at 31 n.1 (noting that, "[a]s with *Moragne*, the 1972 amendments to the LHWCA have rendered *Gaudet* inapplicable on its facts.").

140. Sutton v. Earles ("Earles II"), 26 F.3d 903, 914-17 (9th Cir. 1994); *cf.* Emery v. Rock Island Boatworks, Inc., 847 F. Supp. 114, 116-18 (E.D. Ill. 1994) (holding that the spouse of a non-seaman injured in state waters could recover loss of society damages because neither the Jones Act nor DOHSA applied to preclude or limit damages); Schumacher v. Cooper, 850 F. Supp. 438, 453-54 (D. S.C. 1994) (holding that the dependents of a non-seaman injured in state waters could recover loss of society damages because neither the Jones Act nor DOHSA applied to preclude or limit damages). *But see* Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1407-08 (9th Cir. 1994) (declining to award loss of society damages to the dependent family members of a non-seaman injured on the high seas, because DOHSA denies such recovery to the beneficiaries of those killed on the high seas, plus, the Supreme Court emphasized uniformity of damages among maritime tort actions in *Miles*).

141. *See* Cantore v. Blue Lagoon Water Sports, Inc., 799 F. Supp. 1151, 1152-55 (S.D. Fla. 1992) (holding that maritime wrongful death plaintiffs may recover loss of society damages for the death of non-seamen in territorial waters only if they are financial dependents of the decedent).

142. Choat v. Kawasaki Motors Corp., 1994 A.M.C. 2626 (Ala. 1994) (not otherwise reported).

143. *See* Walker v. Braus, 861 F. Supp. 527, 535 (E.D. La. 1994) (holding by direction of the Fifth Circuit that *Miles'* emphasis on uniformity in maritime law compelled the decision that the dependent beneficiaries of a non-seaman killed in territorial waters could not recover loss of society damages under general maritime law), *remand before decision*, 995 F.2d 77 (5th Cir. 1993); *but see Earles II*, 26

cuit itself issued two seemingly inconsistent decisions soon after publishing *Earles II*.[144] The Second Circuit has also issued two recent opinions on point, both holding that under general maritime law, only dependent relatives may recover damages for loss of society.[145] Nevertheless, one district court within the Seventh Circuit recently used the same approach to the damages issue as the Ninth Circuit used in *Earles II*.[146] Although a split among the Federal Circuits has developed, the Supreme Court has yet to adopt a rule that explicitly settles the issue of who may recover loss of society damages when, as in *Earles II*, non-seamen perish within territorial waters.[147] Thus, whether the Ninth Circuit correctly interpreted the law of maritime wrongful death when, in *Earles II*, it plotted a course for the future of loss of society damages in general maritime law, has yet to be determined.[148]

F.3d at 914-17.

144. *See* Davis v. Bender Shipbuilding, 27 F.3d 426, 430 (9th Cir. 1994) (declining to award loss of society damages to the family members of a seaman in a general maritime wrongful death action against a shipyard that was not a Jones Act defendant, even though neither DOHSA nor the Jones Act applied to preclude or limit damages, because the underlying rationale for maritime wrongful death actions is based on the need for uniformity as emphasized in *Miles*); *Chan*, 39 F.3d at 1407-08 (declining to award loss of society damages to the dependent family members of a non-seaman injured on the high seas, even though neither the Jones Act nor DOHSA applied, because DOHSA denies such recovery to the beneficiaries of those killed on the high seas, plus, the Supreme Court emphasized uniformity of damages among maritime tort actions in *Miles*).

145. Zicherman v. Korean Air Lines Co., Ltd., No. 93-7490, 1994 WL 685690, at *3-4 (2d Cir. Dec. 5, 1994); Air Disaster at Lockerbie Scotland on December 21, 1988, 37 F.3d 804, 828-30 (2d Cir. 1994).

146. *See Emery*, 847 F. Supp. at 118 (holding that the spouse of a non-seaman injured in state territorial waters could recover loss of society damages because neither the Jones Act nor DOHSA applied to preclude or limit damages). There is no distinction between fatal and non-fatal injuries when awarding loss of society damages under general maritime law. Cater v. Placid Oil, 760 F. Supp. 568, 571 (E.D. La. 1991).

147. *See supra* notes 10, 136-37 and accompanying text.

148. *See Earles II*, 26 F.3d at 917; *but see Wahlstrom*, 4 F.3d at 1090-93 (holding that the non-dependent parents of a non-seaman killed in territorial waters could not recover loss of society damages under general maritime law); Miles v. Melrose, 882 F.2d 976, 989 (5th Cir. 1989) (holding that the non-dependent parent of a seaman killed in territorial waters could not recover loss of society damages under general maritime law), *aff'd sub nom.* Miles v. Apex Marine Corp., 498 U.S. 19 (1990); *Anderson*, 894 F.2d 804, 811-12 (6th Cir. 1990) (holding that the non-dependent parents of non-seamen killed in territorial waters could not recover loss of society damages under general maritime law); *Walker*, 861 F. Supp. at 536 (criticizing *Earles II* as inconsistent with the Supreme Court's decision in *Miles*, because the court in *Earles II* created a non-uniform scheme of recovery under

E. LOSS OF SOCIETY ISSUE IN THE UNITED STATES CIRCUIT COURTS

1. *The Fifth and Eleventh Circuits: Trend to Eliminate Loss Of Society Damages from General Maritime Law*

a. Fifth Circuit

The rule of general maritime wrongful death requiring that loss of society only be awarded to financially dependent beneficiaries has its genesis in the Fifth Circuit's 1985 decision in *Sistrunk v. Circle Bar Drilling Co.*[149] *Sistrunk* held that the non-dependent parents of deceased seamen killed in territorial waters could not recover loss of society under general maritime law when the seamen were survived by spouses or children.[150] In doing so, the court denied relief to the non-dependent parents of two brothers who died when the drilling vessel they worked on capsized in Louisiana state waters.[151] The court commenced its analysis noting that it was guided by general maritime case law.[152] DOHSA did not apply because the deaths took place in territorial waters.[153] Although the Jones Act applied, because the parents' claims were precluded by the spouses' and childrens' claims under the Jones Act's schedule of beneficiaries, the issue was whether the parents could recover loss of society damages relying on *Gaudet* in a general maritime law wrongful death action under *Moragne*.[154] Employing the analytical framework of *Moragne*, the court reasoned it was guided by the "twin aims" of admiralty: "achieving uniformity in the exercise of admiralty jurisdiction and providing special solicitude to seamen."[155]

In *Sistrunk*, the Fifth Circuit reasoned that denying loss of society would provide more uniformity to maritime law because

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maritime law within the Ninth Circuit and among federal circuits).

149. 770 F.2d 455 (5th Cir. 1985), *reh'g denied*, 775 F.2d 301 (5th Cir. 1985), *cert. denied*, 479 U.S. 1019 (1986).

150. Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455, 459-60 (5th Cir. 1985).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 458.

155. *Sistrunk*, 770 F.2d at 458.

parents similarly situated as the plaintiffs were denied standing under the Jones Act, and could not recover such damages under DOHSA or the general maritime law if the deaths had occurred on the high seas.[156] Regarding special solicitude, the court reasoned that because the rationale behind the principle is to benefit *seamen's dependents*, and that since the parents were not dependent on the decedent-seamen, the principle did not apply under the facts of the case.[157] The court announced:

> To the extent that the purpose of admiralty's special solicitude to the survivors of seamen is to provide for their financial support, the special solicitude aim of admiralty has no relevance in this case. The parents in this case were not dependent on their sons. If a purpose of the solicitude is to provide the survivors peace of mind both before a seaman undertakes to venture upon hazardous and unpredictable sea voyages and after the death of the seaman, admiralty's special solicitude does not automatically mean that the parents in this case should recover. As stated above, the parents could not recover if the seamen's deaths occurred on the high seas . . . . Admiralty cannot provide the parents solicitude at a voyage's outset when their right to recover for loss of society is dependent on the fortuity that the deaths occur in territorial waters . . . .[158]

This explanation for special solicitude given by the *Sistrunk* court became the benchmark for later decisions which developed the dependency rule.[159]

One year later, the Fifth Circuit published *Patton-Tully Transp. Co. v. Ratliff*,[160] wherein the court held that *depen-*

156. *Id.* at 459. Existence of spouses and children, preferred beneficiaries under the Jones Act, precluded the parents' recovery. *Id.* Moreover, if the deaths had occurred on the high seas, DOHSA and *Higginbotham* would have limited the parent-beneficiaries recovery to pecuniary loss. *Id.*

157. *Id.* at 460.

158. *Sistrunk*, 770 F.2d at 460; *see* KIPLING, *supra* note 1, at 216.

159. *See* Cantore v. Blue Lagoon Water Sports, Inc., 799 F. Supp. 1151, 1152-55 (S.D. Fla. 1992) (tracing the development of a financial dependency requirement for the recovery of loss of society in general maritime law wrongful death actions).

160. 797 F.2d 206 (5th Cir. 1986).

dent relatives of a Jones Act seaman could recover loss of society damages under general maritime law.[161] In *Patton-Tully*, the Fifth Circuit affirmed the district court's loss of society award under general maritime law.[162] The district court had awarded loss of society to the dependent siblings of a seventeen year old skiff operator who drowned when his boat capsized while ferrying workers across the Mississippi River.[163] The defendant had argued that the decedent qualified as a Jones Act seaman, and thus the siblings were barred from recovery under general maritime law by analogy to the Jones Act's schedule of beneficiaries that allowed only one class of beneficiary, the seamen's mother, to recover damages.[164] The court reasoned, however, that because the policy behind awarding loss of society was "to insure compensation of the dependents for *their* losses resulting from the decedent's death," each dependent of a family's sole source of income was entitled to recover damages for loss of society under general maritime law.[165] Finally, the court in *Patton-Tully* distinguished *Sistrunk* because the parents in *Sistrunk* were non-dependents, whereas in *Patton-Tully*, all claimants were family members and were financial dependents of the decedent, regardless of their familial relationship to him.[166] *Patton-Tully* demonstrates that in an action where loss of society is permitted, certain conditions must be met with regard to loss before the court may allow recovery.[167]

The next case in this line, *Truehart v. Blandon*,[168] was decided by the District Court for the Eastern District of Louisiana in the wake of the Fifth Circuit's decision in *Sistrunk*. The court in *Truehart* extended the *Sistrunk* financial dependency rule to non-seamen.[169] The court declined to award loss of society to the non-dependent parents and siblings of an adult

161. Patton-Tully Transp. Co. v. Ratliff, 797 F.2d 206, 213 (5th Cir. 1986).
162. *Id.*
163. *Id.* at 208, 213.
164. *Id.* at 212.
165. *Id.* at 213 (quoting *Gaudet*, 414 U.S. at 583) (emphasis in original).
166. *Patton-Tully*, 797 F.2d at 213.
167. *See id.*; STUART M. SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH AND INJURY § 3:51, at 238-41 (3rd ed. 1992).
168. 672 F. Supp. 929 (E.D. La 1987). *See* Matthew E. Roy, *Whittling Down Loss of Society in Maritime Wrongful Death Actions*, 14 TUL. MAR. L.J. 393 (1990).
169. Truehart v. Blandon, 672 F. Supp. 929, 937 (E.D. La 1987).

pleasure boater who perished when the yacht he was aboard allided with the causeway bridge on Lake Pontchartrain in Louisiana.[170] Significantly, the district court's reliance on *Sistrunk's* policy to award uniform recovery between statutory maritime cases and *Moragne* actions contributed to the development of the financial dependency requirement.[171]

The *Truehart* court addressed the anomaly in maritime wrongful death recovery wherein *Gaudet* allowed loss of society in *Moragne* actions, while DOHSA and the Jones Act did not.[172] The court harmonized the three remedial causes of action by using *Higginbotham's* admonition that non-pecuniary damages should not be a disproportionately high percentage of recovery in a *Moragne* action for death of a non-seaman in territorial waters.[173] The court concluded that whenever a beneficiary is not financially dependent upon the decedent, loss of society should not be allowed.[174] The court reasoned that whenever a beneficiary is not financially dependent upon the decedent loss of society damages will necessarily be disproportionate to the amount of pecuniary loss, and therefore, pose a significant threat to uniformity between recovery under the remedial statutes and the general maritime law.[175] Thus, because the claimants in *Truehart* were non-dependent, and hence loss of society was a "substantial portion" of their prayer for relief, the court decided to draw a policy line at dependency without regard to seaman status.[176] The court bolstered its argument that dependency is the critical factor by citing *Patton-Tully's* emphasis on the claimant's dependency, rather than the claimant's mere familial relation to the decedent, as allowing recovery.[177] The court then concluded:

> [T]his Court notes that somewhere a line must be drawn between those who may recover for loss of society and those who may not. The line suggested in Supreme Court and Fifth Circuit

170. *Id.* at 930.
171. *Id.* at 936-38.
172. *Id.* at 936.
173. *Id.*
174. *Truehart*, 672 F. Supp. at 936.
175. *Id.*
176. *Id.* at 936-37.
177. *Id.* at 937-38.

> opinions, the line between dependents and nondependents, appears to be the most rational, efficient and fair. A requirement of dependency creates a finite, determinable class of beneficiaries.[178]

The significance of the *Truehart* court's reliance on the policy behind *Sistrunk* to develop the dependency rule may escape first glance.[179] However, because the Jones Act allows recovery for seamen only, when the court in *Sistrunk* advocated uniformity between general maritime remedies and Jones Act recovery, it implicitly favored uniformity in damages between non-seamen and seamen.[180] Moreover, the same logic applies to DOHSA, because uniformity between DOHSA and *Moragne* action recovery necessarily results in consistent damages for wrongful death whether on the high seas or in territorial waters.[181] Thus, the scope of the dependency rule was defined when the *Truehart* court declined to distinguish *Sistrunk* on the basis that it involved Jones Act seamen, reasoning that it would be contrary to basic admiralty principles to extend greater solicitude to the families of non-seamen than to families of seamen, the "wards of admiralty."[182] In failing to distinguish *Sistrunk* as a case involving Jones Act seamen, the *Truehart* court gave teeth to the proposition that *only dependents* may recover loss of society damages under general maritime law whether or not the death occurred in territorial waters or on the high seas and whether or not the decedent was a seaman or a non-seaman.[183]

In 1989, the District Court for the Eastern District of Louisiana decided *Neal v. Barisich, Inc.*[184] In *Neal*, the court held that parents of a seaman who drowned when he was thrown overboard after two vessels collided on the Mississippi River were not entitled to loss of society damages under gener-

178. *Id.* at 938.

179. *See Truehart*, 672 F. Supp. at 936-38.

180. *See Sistrunk*, 770 F.2d at 459.

181. *See Higginbotham*, 436 U.S. at 624. "DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy, . . . because of the interest in uniformity . . . ." *Id.*

182. *See Truehart*, 672 F. Supp. at 937.

183. *See Cantore*, 799 F. Supp. at 1152-55.

184. 707 F. Supp. 862 (E.D. La. 1989), *aff'd*, 889 F.2d 273 (5th Cir. 1989).

al maritime law.[185] The court predicated its finding on dependency.[186] The court reasoned that neither parent was allowed to recover loss of society because the decedent's mother had not lived with the decedent for many years and was not financially dependent on him, and, although the decedent lived with his father, the father was not a financial dependent of his son.[187]

Since *Neal* was pre-*Miles*, the court began by noting that, although loss of society damages were generally not allowed under the Jones Act, non-pecuniary damages could be awarded to the beneficiaries of seamen pursuing unseaworthiness claims under general maritime law.[188] Next, the *Neal* court noted that *Truehart* addressed substantially the same issue, namely whether non-dependent parents have a right to recover loss of society damages under general maritime law for the wrongful death of their child.[189] The court further noted that, although *Truehart* answered the question in the negative, the *Truehart* court's notion of "dependency" was based on a pecuniary definition of the word "dependent."[190] Thus, the *Neal* court noted that *Truehart* left open the possibility a court might give the term "dependency" a broader interpretation and might base dependency on factors tending to prove a mutually supportive relationship between the decedent and the beneficiary, such as whether they had continuously resided together over a substantial period of time, rather than on financial support alone.[191] Nonetheless, the court declined to go beyond the plain meaning of the term "dependency" as defined in *Truehart*, and did not give it any meaning other than financial dependency.[192]

The *Neal* court noted that, at that time, only six cases existed under the general maritime law within the Fifth Circuit wherein parents had sought loss of society for the mari-

185. Neal v. Barisich, Inc., 707 F. Supp. 862, 870-73 (E.D. La. 1989).
186. *Id.* at 872-73.
187. *Id.*
188. *Id.* at 870.
189. *Id.*
190. *Neal*, 707 F. Supp. at 870.
191. *See id.*
192. *Id.* at 872; *see Truehart*, 672 F.2d at 937.

time wrongful death of their child.[193] The court noted that *Patton-Tully* was the only one of these cases in which an award was granted, but distinguished *Patton-Tully* from the others on the fact that the parent in *Patton-Tully* was a financial dependent of her son.[194] Addressing the case at bar, the court reasoned that the decedent's mother had not lived with her son for many years, and was not financially dependent on him, and thus held that her claim must be dismissed.[195] Next, the court considered whether the fact the decedent lived with his father was enough to distinguish his claim from that of the petitioners in *Truehart*.[196] Lacking a policy rationale for making the common residency distinction determinative, the court concluded, "admiralty law suggests no good reason for treating nondependent surviving parents who had been living with their deceased child any differently from those who had not. Thus, the Court must dismiss the father's loss-of-society claim."[197] *Neal* emphasizes the proposition in *Sistrunk* and *Truehart* that financial dependency is the critical factor.[198] Moreover, like *Patton-Tully*, *Neal* demonstrates that in deciding whether to award loss of society damages, a court must analyze the facts presented by the case before extending relief.[199] Finally, *Neal* represents the Fifth Circuit's reluctance to stray from uniformity at the expense of solicitude.[200]

In 1990, the Supreme Court handed down *Miles v. Apex Marine Corp.*, affirming the Fifth Circuit's holding in *Miles v. Melrose*,[201] that in a general maritime wrongful death action the non-dependent parent of a seaman could not recover for

193. *Neal*, 707 F. Supp. at 870-73.

194. *Id.*

195. *Id.* at 872.

196. *Id.*

197. *Id.* at 872-73; *but see infra* notes 534-43 and accompanying text for a discussion on factors admiralty courts might consider in determining whether a beneficiary could recover for loss of society.

198. *See Neal*, 707 F. Supp. at 870-73; *see also Sistrunk*, 770 F.2d at 458-60; *Truehart*, 672 F. Supp. at 936-38.

199. *See Neal*, 707 F. Supp. at 870-73; *see also Patton-Tully*, 797 F.2d at 213; SPEISER, *supra* note 167, § 3:51, at 238-41.

200. *See Neal*, 707 F. Supp. at 870-73; *see also* Miles v. Melrose, 882 F.2d 976, 989 (5th Cir. 1989), *aff'd sub nom.* Miles v. Apex Marine Corp., 498 U.S. 19 (1990). .

201. 882 F.2d 976 (5th Cir. 1989), *aff'd sub nom.* Miles v. Apex Marine Corp., 498 U.S. 19 (1990).

loss of society. The Fifth Circuit had explained its decision by implying that it was based more on policy than precedent:

> Since loss of society is not a financial loss, restricting its recovery to dependents may seem unwarranted. However, tort law has never recognized a principle of awarding redress to all who are injured by an event, however wide the ripple. . . . The number of plaintiffs who could allege [loss of society] . . . necessitates that we draw a line between those who may recover . . . and those who may not. The line suggested by the Supreme Court in *Moragne* and *Gaudet*, and by our own court in *Sistrunk*, the line between dependents and nondependents, "appears to be the most rational efficient and fair.[202]

After the Supreme Court affirmed *Miles*, there has been a trend in the Fifth Circuit to eliminate loss of society from the general maritime law altogether.[203] However, the Fifth Circuit's 1994 decision in *Randall v. Chevron, U.S.A., Inc.*[204] recognized that, even though *Gaudet* was severely limited to its facts in *Miles*, loss of society is proper when a *longshoreman* perishes in territorial waters.[205] The court affirmed substantial awards for loss of society to the wife and adult children of a maritime worker who drowned when he fell into Louisiana waters while being evacuated from an oil drilling platform during a hurricane.[206] Although the court found the adult children were financial dependents of the decedent, in dicta the court addressed the defendant's reliance on the dependency rule stating, "[i]n our view, the law of this circuit does not unequivocally limit recovery of loss of society damages for the wrongful death of a parent to children who are financially dependent on the deceased."[207]

However, the significance of the Fifth Circuit's decision in

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202. Miles v. Melrose, 882 F.2d 976, 988-89 (5th Cir. 1989) (quoting *Truehart*, 672 F. Supp. at 938).

203. *See* Walker v. Braus, 861 F. Supp. 527, 531-38 (E.D. La. 1994), *remand before decision*, 995 F.2d 77 (5th Cir. 1993).

204. 13 F.3d 888 (5th Cir. 1994).

205. Randall v. Chevron, U.S.A., Inc., 13 F.3d 888, 903 (5th Cir. 1994).

206. *Id.* at 902-04.

207. *Id.* at 903.

Randall appears to be limited to its application under the Supreme Court's narrow interpretation of *Gaudet*.[208] In fact, the Fifth Circuit has since gone beyond the dependency rule for recovery of loss of society in general maritime law toward eliminating loss of society altogether from the panoply of remedies allowed for maritime wrongful death.[209] This trend is a result of the Fifth Circuit's broad reading of the uniformity requirement emphasized in *Miles*, as well as a literal reading of *Miles'* treatment of *Gaudet*.[210] Between the Supreme Court's decision in *Miles* and the Ninth Circuit's decision in *Earles II*, the Fifth Circuit declined to award loss of society to beneficiaries in three of the four cases in which it considered the issue.[211] The only case in which loss of society damages were awarded was in *Randall* where the court found *Gaudet* was still good law.[212] The Fifth Circuit applied the *Gaudet* damages rule to the facts of *Randall* to award the dependent relatives of a longshoreman killed in territorial waters damages for loss of society.[213]

b. Eleventh Circuit

In 1992, a district court within the Eleventh Circuit decided *Cantore v. Blue Lagoon Water Sports, Inc.*[214] *Cantore* involved the wrongful death of a jet ski operator who died in a collision with another jet ski on navigable waters in the Florida Keys.[215] The court held that the parents of a non-seaman

208. *See Miles*, 498 U.S. at 31.

209. *Walker*, 861 F. Supp. at 533-38.

210. *See id.* at 533.

211. *Id.* In the three cases wherein the Fifth Circuit declined to award loss of society damages, the court did so regardless of dependency. Nichols v. Petroleum Helicopters, Inc., 17 F.3d 119, 122-23 (5th Cir. 1994) (holding that the dependent beneficiaries of a longshoreman killed on the high seas could not recover loss of society damages); Michel v. Total Transp., Inc., 957 F.2d 186, 191 (5th Cir. 1992) (holding that the dependents of a seaman could not recover loss of society damages); Murry v. Anthony J. Bertucci Constr. Co., 958 F.2d 127, 129-32 (5th Cir. 1992) (holding that the wife of a seaman injured in territorial waters could not recover loss of society damages), *cert. denied*, 113 S. Ct. 190 (1992).

212. *See Randall*, 13 F.3d at 903.

213. *Id.*

214. 799 F. Supp. 1151 (S.D. Fla. 1992) (holding that maritime wrongful death plaintiffs may recover loss of society damages for the death of non-seamen in territorial waters only if they are financial dependents of the decedent).

215. Cantore v. Blue Lagoon Water Sports, Inc., 799 F. Supp. 1151, 1152 (S.D.

killed in territorial waters were entitled to loss of society in a wrongful death action under general maritime law only if financial dependency is proven.[216] The *Cantore* court's decision is significant because it provides a comprehensive and clear post-*Miles* review of the elements of damages available for wrongful death under general maritime law to beneficiaries of non-seamen killed in territorial waters.[217] Moreover, the decision traced the dependency requirement for awarding loss of society and reached the conclusion that the trend is now settled law.[218]

The *Cantore* court first noted the split of authority concerning whether beneficiaries may recover loss of society.[219] The court then identified that, post-*Miles*, the trend was to deny loss of society damages to non-dependents.[220] Addressing *Miles'* application to a non-seaman's case, the court stated that *Miles* was persuasive, but not controlling.[221] Furthermore, the court noted that in a non-seaman's case, recovery may be allowed, because neither the Jones Act nor DOHSA applied.[222] However, turning to precedent, the court cited *Truehart* for the proposition that distinguishing seamen cases from non-seamen cases for the purpose of extending greater recovery to non-seamen was contrary to the tenet of awarding seamen, the "wards of admiralty," maritime law's most generous protection.[223] The court continued by citing *Miles* for the proposition that the Supreme Court, in an effort to restore uniformity to maritime law, intended to limit non-dependent beneficiaries from recovering loss of society damages.[224]

The thrust of the court's analysis in *Cantore* involved identifying dependency as the *sine qua non*[225] of recovery for loss

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Fla. 1992).

216. *Id.* at 1155.

217. *See id.* at 1152-56; *see also* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 8-3, at 476 n.36 (Practitioner's ed. 1994).

218. *Cantore*, 799 F. Supp. at 1152-54.

219. *Id.* at 1152.

220. *Id.*

221. *Id.* at 1153.

222. *Id.*

223. *Cantore*, 799 F. Supp. at 1153.

224. *Id.*

225. *Sine qua non* is Latin for "without which not," i.e., the essence of some-

of society in earlier decisions.[226] The court identified dependency as the critical factor in the Fifth Circuit cases, *Truehart* and *Sistrunk*, as well as in the Sixth Circuit's decision in *Anderson v. Whittaker Corp.*,[227] and numerous state cases applying federal maritime law.[228] The court concluded, "[a]s the foregoing case law demonstrates, general maritime law has moved toward a denial of recovery for loss of society where the survivors are not dependent on the decedent."[229] In following *Truehart's* analysis, *Cantore* became the definitive post-*Miles* case advocating dependency on the decedent as the bright line rule for recovery of loss of society damages under general maritime law.[230]

Although *Cantore* has been cited by at least one learned treatise[231] as exemplary of the damages allowed to a non-seaman's beneficiary in a *Moragne* action, in 1993, another district court within the Eleventh Circuit indicated in dicta that *Cantore* was bad law.[232] In *Complaint of Nobles*[233] ("*Nobles*"), the District Court for the Northern District of Florida addressed maritime claims for loss of support,[234] as well as for loss of society.[235] The claims were brought by the parents of a boy who was killed when the ski boat he was aboard struck a boat house in Florida State territorial waters.[236] Addressing the claim for loss of support, the court followed precedent in holding that the parents could not recover absent a

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thing. BLACK'S LAW DICTIONARY 1385 (6th ed. 1990).

226. *Cantore*, 799 F. Supp. at 1152-56.

227. 894 F.2d 804 (6th Cir. 1990); *see infra* notes 348-57 and accompanying text for a discussion on *Anderson*.

228. *Cantore*, 799 F. Supp. at 1153-54.

229. *Id.* at 1155.

230. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 8-3, at 476 n.36 (Practitioner's ed. 1994).

231. *Id.*

232. Complaint of Nobles ("Nobles"), 842 F. Supp. 1430, 1434 n.8 (N.D. Fla. 1993).

233. 842 F. Supp. 1430 (N.D. Fla. 1993).

234. *Nobles*, 842 F. Supp. at 1434. Loss of support under general maritime law includes all the financial contributions that the decedent would have made to his dependents had he lived, and therefore it is a pecuniary element of damages. Sea-Land Services v. Gaudet, 414 U.S. 573, 584-85 (1974). *See supra* note 41 for a definition of pecuniary damages.

235. *Nobles*, 842 F. Supp. at 1434.

236. *Id.* at 1432.

showing of financial dependency on the child.[237] Nevertheless, the court did not strike the parents' claim for loss of society.[238] Criticizing *Cantore*, the court noted, "[t]his [c]ourt finds that [the] reasoning that ties recovery for loss of society to financial dependency strained, and, therefore, will not adhere to the conclusion reached in *Cantore*."[239] As a result, the court appeared to make a policy decision not to apply a pecuniary standard in awarding non-pecuniary damages.[240]

On May 27, 1994, just eight days before the Ninth Circuit handed down *Earles II*, the Supreme Court of Alabama decided *Choat v. Kawasaki Motors Corp.*[241] Applying federal maritime law under the "savings to suitors clause,"[242] the court followed precedent and held that in a general maritime wrongful death action *Miles* precluded recovery of non-pecuniary damages, such as loss of society.[243] The court denied loss of society to the non-dependent mother of an eighteen year old woman who died without spouse or issue when she was accidentally struck by a jet ski on the Tennessee River in Alabama.[244] After tracing the history of maritime wrongful death, the court interpreted *Miles'* emphasis on uniformity as the Supreme Court's implicit adoption of the dissent's opinion in *Gaudet*, which favored uniformity over extending remedies.[245] The Alabama court thus asserted that *Miles* controlled the holding

237. *Id.* at 1434.

238. *Id.*

239. *Id.* at 1434 n.8.

240. *See Nobles*, 842 F. Supp. at 1434 n.8.

241. 1994 A.M.C. 2626 (Ala. 1994) (not otherwise reported).

242. The "savings to suitors" clause of the United States Constitution, Article 3, section 2, clause 1, which extends federal judicial power over cases of admiralty and maritime jurisdiction, provides for a plaintiff asserting an in personam admiralty claim to sue in a common law (state court) in an ordinary civil action, but in such cases, the state court must apply the substantive rules of the maritime law as they would have been applied if the claim had been instituted in admiralty in federal court. U.S. CONST. art. III, § 2, cl. 1 (extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction). *See* 28 U.S.C. § 1333 (1988) (codifying the federal courts' authority to develop a substantive body of general maritime law); Southern Pacific v. Jensen, 244 U.S. 205, 254 (1917) (holding that state law that changes, modifies, or affects the interstate uniformity of the general maritime law is unconstitutional).

243. Choat v. Kawasaki Motors Corp., 1994 A.M.C. 2626, 2639-40 (Ala. 1994) (not otherwise reported).

244. *Id.*

245. *Id.* at 2639.

in *Choat*.[246]

Addressing the parent's claim that *Miles* only applied to seamen, the court noted that *Miles* expressly limited the holding of *Gaudet* to "longshoremen," and, therefore, *Gaudet's* loss of society remedy did not apply to non-seamen that are not longshoremen.[247] Therefore, the court concluded, the remedy did not apply in *Choat*.[248] Moreover, in dicta the court cited numerous post-*Miles* cases which denied loss of society under general maritime law, regardless of dependency.[249] In following precedent, and hence giving *Miles* the broadest application possible, the Supreme Court of Alabama expressly abandoned the dependency requirement for awarding non-pecuniary damages under general maritime law.[250] The court stated:

> [Some] courts have implicitly or expressly rejected dependency as the *sine qua non* of recoverability. Therefore, we do not base our conclusion on the ground that Choat was not financially dependent on her daughter. Instead, . . . we interpret *Miles* as precluding recovery of non-pecuniary damages, such as . . . loss of society. . . .[251]

The court gave no further support for its position that the dependency rule was unsound.[252]

As non-pecuniary damage awards ebb within the Fifth and Eleventh Circuits, the dependency rule has since spilled over into other federal circuits.[253] If the Supreme Court overrules

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246. *Id.*
247. *Id.*
248. *Choat*, 1994 A.M.C. at 2639-40.
249. *Id.*
250. *Id.* at 2640.
251. *Id.*
252. *See id.*
253. *See* Zicherman v. Korean Air Lines Co., Ltd., No. 93-7490, 1994 WL 685690, at *3-4 (2d Cir. Dec. 5, 1994) (holding that federal maritime law does not allow recovery for loss of society to non-dependent family members); *see also* Air Disaster at Lockerbie Scotland on December 21, 1988, 37 F.3d 804, 828-30 (2d Cir. 1994) (holding that federal maritime law does not allow recovery for loss of society to non-dependent family members); Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084, 1090-93 (2d Cir. 1993) (holding that non-dependent parents of a non-seaman killed in territorial waters could not recover loss of society damages under

Gaudet, the dependency issue will become moot.[254] However, if loss of society remains an element of recoverable damages in maritime wrongful death, dependency will continue to be an issue of contention until the Supreme Court rules on the matter.[255] The Ninth Circuit considered these issues in *Earles II*, and affirmed substantial awards for loss of society, regardless of dependency.

2. *The Ninth Circuit: Dependents of Seamen Denied Loss of Society*

In 1982, the District Court for the Northern District of California decided *Glod v. American President Lines, Ltd.*[256] In *Glod*, the court denied recovery to the non-dependent siblings of a Jones Act seaman who died when he fell from a ladder while boarding his ship.[257] At the time of the accident, the vessel was docked in state territorial waters at Seattle, Washington.[258] Although the siblings were the seaman's sole surviving heirs, the court determined that the siblings were not beneficiaries under the Jones Act, because they were not dependent relatives.[259] The court then considered the siblings' claim under the general maritime law.[260] The district court reasoned that deference to the weight of Supreme Court authority in *Higginbotham*, which guides lower courts to use DOHSA's schedule of beneficiaries when deciding who should

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general maritime law), *cert. denied*, 114 S. Ct. 1060 (1994); Anderson v. Whittaker Corp., 894 F.2d 804, 811-12 (6th Cir. 1990) (holding that non-dependent parents of non-seamen killed in territorial waters could not recover loss of society damages under general maritime law).

254. *See Walker*, 861 F. Supp. at 535 (noting that by following the Fifth Circuit's trend to eliminate loss of society damages from maritime law altogether, and thus denying loss of society to the dependents non-seaman killed in territorial waters, the dependency requirement for recovering loss of society damages under general maritime law may no longer be viable).

255. *See id.*; *but see Randall*, 13 F.3d at 903 (awarding loss of society damages to the adult dependent children of a longshoreman killed in territorial waters); *Earles II*, 26 F.3d at 914-17 (awarding loss of society damages to the non-dependent parents of adult non-seamen killed in territorial waters).

256. 547 F. Supp. 183 (N.D. Cal. 1982).

257. Glod v. American President Lines, Ltd., 547 F. Supp. 183, 184 (N.D. Cal. 1982).

258. *Id.*

259. *Id.* at 184-85.

260. *Id.* at 185-86.

recover under general maritime law, supported the conclusion that non-dependents could not recover loss of society.[261] Moreover, the court noted that the expansive recovery for loss of society in *Gaudet* was predicated upon the majority of state statutes which allowed recovery for loss of society in wrongful death actions outside of the maritime arena.[262] The court reasoned that the underlying rationale in *Gaudet* was not applicable, because most states do not allow non-dependents to recover in a wrongful death action.[263] This, when coupled with *Higginbotham's* admonition that DOHSA be the federal courts' primary guide in a *Moragne* action, led the court to conclude dependency was a determinative factor when awarding remedies for wrongful death under general maritime law.[264]

In 1983, the Ninth Circuit decided *Nygaard v. Peter Pan Seafoods, Inc.*[265] The court in *Nygaard*, deciding an issue similar to that later settled by the Supreme Court in *Miles*, held that non-pecuniary losses, such as loss of society, could not be recovered under the Jones Act.[266] The court denied recovery for loss of society to the minor son of a seaman lost from a fishing vessel in the Bering Sea.[267] The court noted that *Higginbotham* denied loss of society under DOHSA, and also, that the Supreme Court had not yet decided whether loss of society was allowed under the Jones Act.[268]

In *Nygaard*, the Ninth Circuit considered whether, in light of *Moragne* and *Gaudet*, it would be more consistent with the humanitarian policy manifest in the extension of remedies under general maritime law to allow loss of society damages.[269] The Ninth Circuit looked to existing general maritime precedent and followed the First and Fifth Circuits in holding that loss of society was not recoverable.[270] In reaching its con-

261. *Id.*
262. *Glod*, 547 F. Supp. at 186.
263. *Id.*
264. *Id.*
265. 701 F.2d 77 (9th Cir. 1983).
266. Nygaard v. Peter Pan Seafoods, Inc., 701 F.2d 77, 79-80 (9th Cir. 1983).
267. *Id.* at 78, 80.
268. *Id.* at 79.
269. *Id.*
270. *Id.* at 80.

clusion, the court also cited the Second Circuit's decision in *Igneri v. Compagnie de Transports Oceaniques*[271] for the proposition that the Jones Act did not allow recovery of non-pecuniary loss, such as loss of society.[272] Moreover, the court noted that it agreed with the other circuits' reasoning that any injustice perpetuated by the rule against recovery for non-pecuniary loss should be remedied by Congress.[273] The court observed that "[d]eference to the First and Fifth Circuits, leads us [to our conclusion that] . . . *Moragne* and *Gaudet* are authorities simply too oblique to justify a departure from settled law."[274] Thus, the Ninth Circuit demonstrated that, at least with regard to seamen's recovery, its analysis was guided by uniformity among Federal Circuits and conformity with Congressional intent, not humanitarian policies favorable to extending remedies.[275]

In the same year as *Nygaard*, the District Court for the Western District of Washington decided *Weyer v. ABC Charterers, Inc.*[276] Without the need to distinguish between the decedent's status as a seaman or non-seaman, the court held that a dependent divorced wife did not have standing to recover in a *Moragne* action.[277] *Weyer* involved an action brought by the divorced wife of a deceased pleasure boater[278] who had been supporting his ex-wife pursuant to a dissolution contract.[279] The court followed *Glod*, a seaman's case, reasoning that *Higginbotham* had "laid to rest" any ambiguity that arose as a result of *Gaudet*, and therefore, courts must look to DOHSA's schedule of beneficiaries to determine who is a beneficiary entitled to recover loss of society damages in a *Moragne*

271. 323 F.2d 257 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964); *see infra* notes 330-35 and accompanying text for a discussion on *Igneri*.

272. *Nygaard*, 701 F.2d at 79.

273. *Id.* at 80.

274. *Id.*

275. *See id.* at 79-80.

276. 558 F. Supp. 364 (W.D. Wash. 1983).

277. Weyer v. ABC Charterers, Inc., 558 F. Supp. 364, 364-67 (W.D. Wash. 1983).

278. The decedent was the charterer of a pleasure boat, and thus was a non-seaman. *See Weyer*, 558 F.2d at 365; McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 355 (1991).

279. *Weyer*, 558 F.2d at 365.

action.[280] The court expressly declined to fashion a federal common law schedule of beneficiaries different from DOHSA.[281] Thus, the court chose the policy of uniformity over the humanitarian policy when it rejected the ex-wife's argument that restricting recovery for wrongful death to spouses, children, and dependent relatives would "unjustly exclude a large number of beneficiaries who are truly dependent upon [a] decedent and who suffer a pecuniary loss."[282]

Two years later, the Ninth Circuit considered *Evich v. Connelly*.[283] *Evich* involved a general maritime wrongful death action by the non-dependent brothers of a seaman who perished when the fishing vessel he worked aboard sank after striking rocks off the coast of Alaska.[284] The court held that non-dependent siblings of a deceased seaman could not maintain a *Moragne* action absent a showing of financial dependency on the decedent.[285] After looking to the Jones Act's schedule of beneficiaries, and citing *Glod* for the proposition that the Jones Act did not provide standing for non-dependent siblings, the court concluded that no claim for wrongful death could be maintained under the Jones Act.[286] The court determined that the brothers could not bring a wrongful death claim under general maritime law, because DOHSA's schedule of beneficiaries precluded non-dependent relatives from recovery.[287] The court, absent a reason for distinguishing non-seamen and seamen cases, cited both *Glod* and *Weyer* reasoning that *Moragne* actions were not allowed when brought by persons not included in DOHSA's schedule of beneficiaries.[288] Thus, the court concluded, recovery for maritime wrongful death under general maritime law would require the seaman's brothers to prove

280. *Id.* at 366.
281. *Id.* at 366-67.
282. *Id.* at 366.
283. 759 F.2d 1432 (9th Cir. 1985) (holding that by analogy to DOHSA, siblings must prove dependency to recover damages in a general maritime wrongful death action).
284. Evich v. Connelly, 759 F.2d 1432, 1433-34 (9th Cir. 1985) (incorporating the facts of its companion case, *Berg v. Chevron*). *See* Berg v. Chevron U.S.A., Inc., 759 F.2d 1425, 1427-29 (9th Cir. 1985).
285. *Evich*, 759 F.2d at 1432-33.
286. *Id.* at 1433.
287. *Id.* at 1433-34.
288. *See id.*

that they were dependent relatives.[289]

Consistent with the analysis applied in *Glod*, *Nygaard*, *Weyer* and *Evich*, the Ninth Circuit decided *Bergen v. F/V St. Patrick*.[290] The issue was whether punitive damages were available under general maritime law to supplement Jones Act and DOHSA remedies.[291] However, the analysis is applicable in deciding whether to award loss of society under general maritime law, because punitive damages, like loss of society, are non-pecuniary, and are therefore not generally allowed when either of the federal remedial statutes apply.[292]

Bergen involved the abandonment of a fishing vessel by her crew.[293] The fishing vessel had been rolled on its side in a storm while operating on the high seas in the Gulf of Alaska.[294] When the vessel took on water, the unlicensed and unqualified master ordered her evacuated.[295] As a result, ten of the twelve crewmembers died of exposure.[296] The boat was later recovered still afloat.[297] The Ninth Circuit disallowed punitive damages against the vessel's owners, who knew the boat's captain was unqualified, because Congress intended DOHSA to preempt non-pecuniary damages when it applied.[298] The court cited *Higginbotham*, reasoning that "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of a non-pecuniary supplement."[299] The court concluded that when a DOHSA claim is joined with a Jones Act claim, neither statute may be supplemented by the general maritime law.[300]

The court in *Bergen* had cause to consider dependency as

289. *Id.* at 1433-34.
290. 816 F.2d 1345 (9th Cir. 1987).
291. Bergen v. F/V St. Patrick, 816 F.2d 1345, 1347 (9th Cir. 1987).
292. *See id.* at 1345-50.
293. *Id.* at 1346-47.
294. *Id.* at 1347.
295. *Id.*
296. *Bergen*, 816 F.2d at 1347.
297. *Id.*
298. *Id.* at 1347-50.
299. *Id.* at 1349.
300. *Id.*

it affects recovery for loss of support under DOHSA.[301] In addressing the issue, the trial court had made a specific finding of fact that the quadriplegic mother and totally disabled father of one of the deceased seamen were entitled to the pecuniary value of the seaman's lost support.[302] The parents of the other seamen were denied recovery for loss of support, because the Ninth Circuit deemed the evidence on the record insufficient to prove parental dependency.[303] With regard to loss of society, the court commented in dicta, "[w]e recognize the parents tragic loss of love and companionship from their deceased children. But loss of society is non-pecuniary and therefore not recoverable."[304]

In 1993, the Ninth Circuit decided *Smith v. Trinidad Corp.*[305] *Smith* involved a claim for loss of society brought by the wife of a Jones Act seaman.[306] The *Smith* court held that wives of injured seamen could not recover for non-pecuniary loss under the Jones Act or general maritime law.[307] The court affirmed summary judgment in favor of the shipowner noting that the Supreme Court's decision in *Miles* changed the law which previously allowed beneficiaries of seamen to recover for loss of society in unseaworthiness claims brought under general maritime law.[308] The Ninth Circuit stated that "[t]he Supreme Court in *Miles* . . . precluded actions for loss of society under the Jones Act, . . . and [under] general admiralty law."[309] The court also noted that it was following the Fifth Circuit which had recently held that previous cases allowing loss of society to seamen's wives under general maritime law

301. *Bergen*, 816 F.2d at 1350-51.

302. *Id.* at 1350.

303. *Id.*; *but cf. Earles II*, 26 F.3d at 914-17 (unconditionally extending recovery for loss of society to the parents of non-seamen under maritime law). *See infra* notes on 534-43 and accompanying text for a discussion on factors admiralty courts might consider in determining whether a beneficiary could recover for loss of society.

304. *Bergen*, 816 F.2d at 1350.

305. 992 F.2d 996 (9th Cir. 1993) (holding that the wife of an injured seaman could not recover loss of society damages under general maritime law).

306. Smith v. Trinidad Corp., 992 F.2d 996 (9th Cir. 1993).

307. *Id.* There is no distinction between fatal and non-fatal injuries when awarding loss of society damages under general maritime law. Cater v. Placid Oil, 760 F. Supp. 568, 571 (E.D. La. 1991).

308. *Smith*, 992 F.2d at 996.

309. *Id.*

were overruled by *Miles*.[310] The court concluded, "[w]e agree with the Fifth Circuit's [broad] reading of *Miles* and affirm summary judgment."[311]

The Ninth Circuit's holding in *Smith*, in accord with *Kline v. Maritrans CP, Inc.*,[312] decided within the Third Circuit, illustrates the state of the law, post-*Miles*, regarding seamen's recovery for loss of society.[313] Against this background the Ninth Circuit considered *Earles II* in the non-seaman context, splitting from the Second, Fifth, and Sixth Circuits as to whether, if loss of society damages are allowed, recovery may be extended to non-dependent parents of non-seamen consistent with both special solicitude and uniformity.[314]

3. *The First, Second, Third and Sixth Circuits: Reconciling the Aims of Uniformity and Special Solicitude*

The doctrinal analysis of the First, Second, Third, and Sixth Circuits are similar in that they focus on the status of the decedent as a seaman or non-seaman, and apply both the doctrine of uniformity and special solicitude, ensuring that remedies available to the beneficiaries of seamen are either uniform or not less than those allowed to the beneficiaries of non-seamen. Moreover, when deciding whether to award loss of society, these circuits look to the general maritime law and decline to distinguish between seamen and non-seamen cases, thereby adhering to a dependency rule.

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310. *Id.*

311. *Id.*

312. 791 F. Supp. 455 (D. Del. 1992); *see infra* notes 324-29 and accompanying text for a discussion on *Kline*.

313. *See Smith*, 992 F.2d at 996; *see also* Kline v. Maritrans CP, Inc., 791 F. Supp. 455, 462 (D. Del. 1992). *See generally, Miles*, 498 U.S. at 33 (holding that beneficiaries of seaman can not recover for loss of society).

314. *See Earles II*, 26 F.3d at 915-17; *see supra* notes 10, 136-37 and accompanying text for a discussion on the split among circuits.

a. Seamen

Since the Supreme Court decided *Gaudet*, applying the humanitarian policy of general maritime law to introduce loss of society damages into admiralty, the Court has decided *Miles*, re-affirming the need for admiralty uniformity.[315] In the same year the Supreme Court decided *Miles*, a district court within the First Circuit considered *Rollins v. Peterson Builders, Inc.*[316] The court in *Rollins*, like the Ninth Circuit in *Earles II*, declined to follow the Fifth Circuit's financial dependency rule, and thus sought to extend loss of society to the non-dependent mother of a woman[317] killed by electrocution while working as a crewmember aboard an academic research vessel.[318] First, the court looked to the language of the Supreme Court's decisions in *Moragne* and *Gaudet* to determine that the defendants' reliance on the word "dependent" did not evince the Supreme Court's intention to preclude non-dependents from recovering loss of society, especially in light of the broad nature of the damages and the principle of special solicitude.[319] The court then considered *Miles v. Melrose* which had not yet been affirmed by the Supreme Court and concluded that, because at that time, loss of society was allowed to the spouse of a deceased seaman, it would be consistent with the principle of special solicitude to extend the same remedy to the non-dependent parent of a deceased seaman who died without a spouse.[320] Notwithstanding its comprehensive analysis, the *Rollins* court was ultimately compelled to grant the defendant's motion *in limine* to strike the plaintiff's claim for loss of society when the Supreme Court decided *Miles v. Apex Marine Corp.*[321]

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315. *Gaudet*, 414 U.S. at 587-91; *Miles*, 498 U.S. at 26-27 (noting that admiralty courts that "supplement" statutory remedies in maritime wrongful death actions must do so to achieve uniform vindication of national policy).

316. 761 F. Supp. 918 (D.R.I. 1990).

317. The decedent was considered a "seaman" under the Jones Act. Rollins v. Peterson Builders, Inc., 761 F. Supp. 918, 920 (D.R.I. 1990). *See supra* note 5 and accompanying text for a discussion on seaman status.

318. *Rollins*, 761 F. Supp. at 922-24.

319. *Id.* at 922-23. *Cf. Earles II*, 26 F.3d at 914-17.

320. *Rollins*, 761 F. Supp. at 923-24. *Cf. Earles II*, 26 F.3d at 914-17, 917 n.18.

321. *Rollins*, 761 F. Supp. at 929.

Although loss of society was denied in *Rollins*, the case is significant to the background of the dependency issue, because it illustrates the minority approach ultimately utilized by the Ninth Circuit in *Earles II*.[322] Moreover, when the denial of loss of society damages compelled by the seaman status of the decedent in *Rollins* is contrasted with the substantial awards for loss of society in *Earles II*, the anomaly shaped by the Ninth Circuit between seamen's recovery and non-seamen's recovery is accentuated.[323]

In *Kline v. Maritrans CP, Inc.*,[324] the District Court of Delaware, citing *Miles*, held that the non-dependent beneficiaries of a deceased seaman could not recover loss of society damages.[325] The court denied recovery to the parents of a twenty-eight year old Tugboat Mate who drowned after he slipped on ice and fell overboard while his vessel was moored in Fall River, Massachusetts.[326] The court cited the Ninth Circuit's decision in *Bergen v. F/V St. Patrick*,[327] a DOHSA case, for the proposition that to recover *any* damages under the general maritime law, parents of a seaman must show dependency.[328] *Kline* illustrates *Miles'* effect on the elements of damages allowed to beneficiaries of seamen, and represents the state of the law, post-*Miles*, regarding seamen's recovery for

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322. *See Rollins*, 761 F. Supp. at 921-24; *Earles II*, 26 F.3d at 914-17. The Ninth Circuit in *Earles II* misrepresented the ultimate holding in *Rollins*, which denied non-dependent parents of a *seaman* standing to recover loss of society under general maritime law by citing it for the proposition that loss of society could be awarded to the beneficiaries of *non-seamen* regardless of dependency. *See Earles II*, 26 F.3d at 917 n.18. An accurate reading of *Rollins* reveals the district court's rationale for attempting to extend recovery for loss of society to the non-dependent mother was that:

> *Gaudet* . . . already determined that . . . [special] solicitude warrants an award of loss of society damages to a spouse of a *seaman* who is . . . killed. It is a small step indeed to find that *the same solicitude* should extend to the *parents* of a deceased *seaman*. . . .

Rollins, 761 F. Supp. at 924 (emphasis added); *see also* KIPLING, *supra* note 1, at 216.

323. *See Rollins*, 761 F. Supp. at 923-24; *Earles II*, 26 F.3d at 914-17; *see also infra* notes 450-61 for a comparison of *Rollins* with *Earles II*.

324. 791 F. Supp. 455 (D. Del. 1992).

325. Kline v. Maritrans CP, Inc., 791 F. Supp. 455, 461 (D. Del. 1992).

326. *Id.* at 457.

327. 816 F.2d 1345 (9th Cir. 1987); *see supra* notes 290-304 and accompanying text for a discussion on *Bergen*.

328. *See Kline*, 791 F. Supp. 462.

wrongful death.[329]

b. Non-Seamen

In 1963, the Second Circuit decided *Igneri v. Compagnie de Transports Oceaniques*,[330] a longshoreman case which, in the context of personal injury rather than wrongful death, involved the precise issue presented to the Supreme Court ten years later in *Gaudet*.[331] The court in *Igneri* held that the wife of a longshoreman injured in New York territorial waters could not recover for loss of society.[332] After identifying the issue as one of first impression, the court determined that the common law was inconclusive, and thus looked to maritime law.[333] First, Judge Friendly noted that Congress did not authorize recovery for loss of society in a seaman's claim under the Jones Act.[334] The court then reasoned it could not create an anomaly nor discriminate against seamen by putting maritime shore workers' wives in a better position than seamen's wives.[335] The court announced, "[w]e can think of no reason why Congress, having ruled out a maritime claim . . . for loss of [society] by the spouse of a negligently injured seaman, would wish the courts to construct one for the spouse of a negligently injured [longshoreman]."[336]

Estate of Fajardo v. Maersk Line Agency[337] confirmed the basic methodology used by the Second Circuit in *Igneri* when deciding whether to award recovery for loss of society in general maritime law tort actions despite the intervening rule of

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329. *Kline*, 791 F. Supp. at 461; *see Miles*, 498 U.S. at 33.

330. 323 F.2d 257 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964).

331. Igneri v. Compagnie de Transports Oceaniques, 323 F.2d 257, 267 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964).

332. *Id.* There is no distinction between fatal and non-fatal injuries when awarding loss of society damages under general maritime law. Cater v. Placid Oil, 760 F. Supp. 568, 571 (E.D. La. 1991).

333. *Igneri*, 323 F.2d at 258-59.

334. *Id.* at 266.

335. *Id.* at 267.

336. *Id.*

337. 1989 A.M.C. 1923 (D. Md. 1988) (not otherwise reported). *See* Timothy R. Lord, *Drowning In Unoccupied Waters:* Estate of Fajardo v. Maersk Line Agency, 15 TUL. MAR. L.J. 423 (1991).

Gaudet which allowed loss of society damages.[338] Significantly, the court in *Fajardo* declined to distinguish between seamen and non-seamen cases when deciding whether to award loss of society to the *non-dependent* parents of a minor[339] who drowned in Chesapeake Bay due to large swells created from the wake of defendant's passing container ship.[340] Since neither DOHSA nor the Jones Act otherwise applied, the court first looked to maritime case law for guidance, as the Second Circuit had done in *Igneri*.[341] In doing so, the court relied on the Fifth Circuit's decisions in *Sistrunk v. Circle Bar Drilling*[342] and *Truehart v. Blandon*[343] for the proposition that, post-*Gaudet*, the state of maritime wrongful death favored awarding loss of society to a decedent's *dependent* beneficiaries.[344] Next, the court noted the Supreme Court's instruction to lower courts to look to the federal maritime statutes when awarding damages under general maritime law.[345] The court quoted *Higginbotham*, "DOHSA should be the courts' primary guide as they refine the non-statutory death remedy, . . . because of the interest in uniformity. . . ."[346] Therefore, although the maritime statutory scheme did not apply, the court looked to it for guidance concluding that, because neither DOHSA nor the Jones Act permitted recovery of loss of society awards by non-dependent parents, neither did the general maritime law.[347]

In *Anderson v. Whittiker Corp.*,[348] the Sixth Circuit con-

338. *See* Estate of Fajardo v. Maersk Line Agency, 1989 A.M.C. 1923, 1926-28 (D. Md. 1988) (not otherwise reported).

339. The decedent was a non-seaman. *See id.*

340. *Id.* at 1924, 1927.

341. *Id.* at 1926.

342. 770 F.2d 455 (5th Cir. 1985) (holding that the non-dependent parents of two seamen killed in territorial waters could not recover loss of society damages under general maritime law), *reh'g denied*, 775 F.2d 301 (5th Cir. 1985), *cert. denied*, 479 U.S. 1019 (1986); *see supra* notes 149-59 and accompanying text for a discussion on *Sistrunk*.

343. 672 F. Supp. 929 (E.D. La 1987) (holding that the non-dependent family members of a non-seaman killed in territorial waters could not recover loss of society damages under general maritime law); *see supra* notes 168-83 and accompanying text for a discussion on *Truehart*.

344. *Fajardo*, 1989 A.M.C. at 1926 (emphasis added).

345. *Id.*

346. *Id.* (quoting *Higginbotham*, 436 U.S. at 624).

347. *See id.* at 1927.

348. 894 F.2d 804 (6th Cir. 1990) (holding that the non-dependent parents of

sidered a situation where four men died when a boat they were shuttling across Lake Michigan was swamped.[349] After determining that the decedents were non-seamen, the district court ruled that the widows and children of two of the decedents were entitled to loss of society.[350] However, the court denied identical claims by the non-dependent parents of the other two victims.[351] The Sixth Circuit affirmed noting that the district court's decision relied on the "twin aims" of maritime law, "achieving uniformity in the exercise of admiralty jurisdiction and . . . providing special solicitude to seamen."[352] The Sixth Circuit reasoned that the pecuniary limitation on damages under the Jones Act and DOHSA led to the conclusion that to deny loss of society would provide more uniformity to admiralty jurisdiction.[353] Furthermore, the court emphasized that since non-dependent parents could not recover loss of society under either of the federal wrongful death statutes, and the decedents were non-seamen, its decision did not hinder the aim of providing special solicitude.[354] Therefore, the Sixth Circuit's decision was in accord with the district court's holding in *Fajardo*.[355] *Anderson* followed the Fifth Circuit's holding in *Miles v. Melrose*,[356] as well as the Supreme Court's decisions in *Moragne* and *Gaudet*, to advance dependency as the critical factor in determining whether to award loss of society damages.[357]

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non-seamen killed in territorial waters could not recover loss of society damages under general maritime law), *aff'g*, 692 F. Supp. 764 (W.D. Mich 1988); *but see Earles II*, 26 F.3d at 916 n.14.

349. Anderson v. Whittaker Corp., 894 F.2d 804, 806-07 (6th Cir. 1990).

350. *Id.* at 807.

351. *Id.*

352. *Id.* at 811.

353. *Id.*

354. *Anderson*, 894 F.2d at 811; *but see Earles II*, 26 F.3d at 915 (reasoning that parents were DOHSA beneficiaries regardless of dependency).

355. *See Anderson*, 894 F.2d at 811; *Fajardo*, 1989 A.M.C. at 1924-28.

356. 882 F.2d 976, 989 (5th Cir. 1989) (holding that the non-dependent parent of a seaman killed in territorial waters could not recover loss of society damages under general maritime law), *aff'd sub nom.* Miles v. Apex Marine Corp., 498 U.S. 19 (1990).

357. *Anderson*, 894 F.2d at 811-12.

Wahlstrom v. Kawasaki Heavy Indus., Ltd.,[358] represents the present view of the Second Circuit which is in accord with the clear majority of courts on the loss of society dependency issue in the post-*Miles* era.[359] In *Wahlstrom*, the parents of a seventeen year old boy, killed when the jet ski he was operating collided with a power boat on the Themes River in Connecticut, brought a general maritime wrongful death claim against the jet ski's manufacturer.[360] The Second Circuit held that the non-dependent parents of a non-seaman killed in territorial waters could not recover loss of society damages.[361] The Second Circuit reviewed the background of maritime wrongful death recovery and noted that no Supreme Court case supported non-dependent beneficiaries recovering loss of society, and neither did DOHSA nor the Jones Act when they applied.[362] Recognizing, however, that the federal maritime wrongful death statutes did not apply, the court looked to federal court precedent on the issue and found, "the overwhelming majority of the pertinent federal decisions [hold] that nondependent parents cannot recover damages for loss of society in a general maritime [wrongful death] action."[363]

In *Wahlstrom*, the Second Circuit squarely addressed its policy for awarding non-pecuniary damages based on financial dependency, justifying the dependency rule by using three species of uniformity.[364] Prior to affirming its adherence to a dependency rule, however, the court dismissed a principal argument against their policy.[365] The court noted that some other courts did not impose a dependency requirement when deciding whether to award non-pecuniary damages, such as

358. 4 F.3d 1084 (2d Cir. 1993) (holding that the non-dependent parents of a non-seaman killed in territorial waters could not recover loss of society damages under general maritime law), *cert. denied*, 114 S. Ct. 1060 (1994); *but see Earles II*, 26 F.3d at 916 n.14.

359. Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084, 1091-93 (2d Cir. 1993); *see also* Zicherman v. Korean Air Lines Co., Ltd., No. 93-7490, 1994 WL 685690, at *3-4 (2d Cir. Dec. 5, 1994); Air Disaster at Lockerbie Scotland on December 21, 1988, 37 F.3d 804, 828-30 (2d Cir. 1994).

360. *Wahlstrom*, 4 F.3d at 1086.

361. *Id.* at 1093.

362. *Id.* at 1091.

363. *Id.* at 1092.

364. *Id.* at 1092-93.

365. *Wahlstrom*, 4 F.3d at 1092.

loss of society, because dependency is a pecuniary standard, and that therefore, the logical foundation of such a policy was too irrational to be the basis of an inflexible rule.[366] The court however continued, "[c]ountervailing concerns nevertheless outweigh the force of this contention."[367] The Second Circuit's first policy concern was that uniformity among admiralty courts prevail.[368] The court announced that "[i]t would hardly promote the uniform administration of admiralty actions for this circuit to adopt a rule in conflict with almost every decided federal case on this issue."[369] Second, the court reasoned that in the interest of uniformity between remedies for seamen and non-seamen, loss of society damages could not be extended to the non-dependent parents of a non-seaman, because the Supreme Court in *Miles* denied such recovery to the parents of seamen, the "wards of admiralty," who therefore are entitled to admiralty's greatest recovery.[370] Third, the court sought uniformity with Supreme Court precedent noting that extending the rule of *Gaudet* to the non-dependent parents of non-seamen killed in territorial waters would be inconsistent with *Miles*.[371] The court reasoned that because *Gaudet* was limited to its facts in *Miles*, thereby restricting loss of society to longshoremen in territorial waters, Supreme Court precedent evidenced a trend toward restricting loss of society as an element of damages in maritime cases.[372] Thus, the clear trend within the Second, as well as the Third and Sixth Circuits, is to award loss of society damages to the parents of non-seamen when not precluded by statute (i.e., in territorial waters), but

366. *Id.*; *see also Zicherman*, 1994 WL 685690, at *3 (noting that "[n]o doubt [a dependency] rule denies recovery to some deserving parties; non-dependent survivors may feel the loss of a loved one as keenly as dependent survivors"); Randall v. Chevron, U.S.A., Inc., 13 F.3d 888, 903 (5th Cir. 1994) (noting that, "[i]n our view, the law of this circuit does not unequivocally limit recovery of loss of society damages for the wrongful death of a parent to children who are financially dependent on the decedent"); *but cf.* Walker v. Braus, 862 F. Supp. 527, 535 (E.D. La. 1994) (recognizing that by concluding loss of society damages are not allowed in a general maritime wrongful death action, "implies that the dependency requirement for recovering loss of society damages under general maritime law is no longer viable"), *remand before decision*, 995 F.2d 77 (5th Cir. 1993).

367. *Wahlstrom*, 4 F.3d at 1092; *but see Earles II*, 26 F.3d at 914-17.

368. *Wahlstrom*, 4 F.3d at 1092.

369. *Id.*; *but see Earles II*, 26 F.3d at 914-17.

370. *See Wahlstrom*, 4 F.3d at 1092.

371. *Id.*

372. *Id.* at 1092-93.

only when there is a showing of financial dependency. Against this background, the Ninth Circuit published *Earles II*.[373]

IV. THE COURT'S ANALYSIS

In *Sutton v. Earles*[374] (*"Earles II"*) the Ninth Circuit emphasized that it was not constrained by the Jones Act or DOHSA, nor compelled by the Supreme Court's recent decision in *Miles v. Apex Marine Corp.*,[375] to impose restrictions on general maritime law death remedies sought on behalf of non-seamen who perish within territorial waters.[376] The court expressly asserted that *Miles* did not control.[377] Further, the court disagreed with the Second, Fifth, and Sixth Circuits' broad interpretations of the uniformity rationale of *Miles*.[378] Thus, finding itself free to disregard the uniformity component of *Miles*, the court exercised its own expansive role in developing maritime law, and consistent with its power to fashion liberal remedies in admiralty, extended recovery for loss of society to the non-dependent parents of non-seamen.[379]

In awarding damages, the Ninth Circuit had to transit a mine field of guiding admiralty law principles.[380] The court exposed the fact that distinctions that make recovery in maritime wrongful death actions anomalous.[381] As a result, the

373. *See Earles II*, 26 F.3d at 915-17.

374. Sutton v. Earles ("Earles II"), 26 F.3d 903 (9th Cir. 1994), *remand before appeal*, Earles v. United States ("Earles I"), 935 F.2d 1028 (9th Cir. 1991).

375. 498 U.S. 19 (1990).

376. *Earles II*, 26 F.3d at 915, 917.

377. *See id.* at 917.

378. *Id.* at 916-17; *see also* Walker v. Braus, 861 F. Supp. 527, 536-37 (E.D. La. 1994) (declining to follow *Earles II*), *remand before decision*, 995 F.2d 77 (5th Cir. 1993).

379. *See Earles II*, 26 F.3d at 917.

380. *See id.* at 914-17. Among the principles the court dealt with were: *uniformity*, *special solicitude*, and *dependency*. *See id.* Dependency is a consideration, because, as two prominent commentators in the field have noted, "since pecuniary loss to the beneficiary is the basis for recovery [under the remedial maritime statutes] the dependency idea cannot be lost sight of." GRANT GILMORE AND CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY, § 6-30, at 361-62 n.174 (2d ed. 1975).

381. *See Earles II*, 26 F.3d at 914-17. Factors that may effect anomalous recovery are: (1) situs of the casualty, *territorial waters* versus *high seas*; (2) status of the decedent, *seaman* versus *non-seaman*; and (3) status of the beneficiary, *dependent* versus *non-dependent*. *See id.*

Ninth Circuit illustrated the circumstance that as remedies develop in general maritime law, antiquated statutory constraints on damages for beneficiaries of seamen become increasingly more unjust, thus highlighting the need for legislative relief.[382]

A. General Maritime Wrongful Death Actions Allow Awards for Loss of Society

In *Earles II*, the Ninth Circuit began its analysis of damages by summarizing the history of wrongful death in maritime jurisprudence.[383] After noting examples of judicially sanctioned non-uniform recovery throughout the history of maritime wrongful death law, the Ninth Circuit agreed with the appellees' argument that *Gaudet* had already decided the precise question presented, and asserted that *Gaudet* controlled its decision.[384] Therefore, the court concluded, loss of society is authorized when, as in *Gaudet*, a non-seaman is killed in territorial waters.[385] The court reasoned that, although both DOHSA and the Jones Act limit damages to pecuniary loss for maritime wrongful deaths, DOHSA did not apply because the deaths took place in territorial waters, and the Jones Act did not apply because the decedents were not seamen.[386] The court distinguished both *Higginbotham* and *Miles* by the fact that the remedial maritime statutory scheme applied in those cases, whereas in *Earles II*, it did not.[387] Therefore, the court reasoned that it must follow the general maritime rule which, under *Gaudet*, allowed loss of society damages.[388] The Ninth Circuit thus concluded that the beneficiaries of non-seamen killed in territorial waters could recover loss of society as an element of damages in a general mari-

382. *See Earles II*, 26 F.3d at 917; *see supra* note 1 and accompanying text.

383. *Earles II*, 26 F.3d at 914-15; *see supra* notes 68-148 and accompanying text for a discussion on the history of maritime wrongful death jurisprudence.

384. *Earles II*, 26 F.3d at 915; *see also* Opening brief for Appellee at 37, Sutton v. Earles ("Earles II"), 26 F.3d 903 (9th Cir. 1994) (No. 92-55548).

385. *Earles II*, 26 F.3d at 915 (emphasis added).

386. *Id.*

387. *Id.* In *Higginbotham*, DOHSA applied because the death occurred on the high seas, while in *Miles*, the Jones Act applied because the decedent was a seaman. *Id.*

388. *See id.*

time wrongful death action.[389]

B. LOSS OF SOCIETY AWARDS DO NOT REQUIRE DEPENDENCY

1. *General Maritime Law Allows Parents to Recover for Wrongful Death Regardless of Dependency*

The Ninth Circuit reviewed the trial court's finding that the parents of non-seamen were entitled to loss of society without proving they were financially dependent upon the decedents.[390] The court framed the issue as one of standing.[391] The court looked to DOHSA and the Jones Act for guidance as to who has standing to recover damages when a non-seaman perishes within territorial waters.[392] The Ninth Circuit reasoned that parents had standing to recover damages under the Jones Act, regardless of dependency, when, as in *Earles II*, there is no surviving spouse or child.[393] The Ninth Circuit then agreed with the Second Circuit's reasoning in *Wahlstrom v. Kawasaki Heavy Indus. Ltd.*,[394] which used DOHSA's schedule of beneficiaries, which includes a "wife, husband, *parent*, child *or* dependent relative," to reject dependency as the critical factor.[395] The court reasoned that, since *Gaudet* instructs that loss of society damages are allowed in a *Moragne* action when the Jones Act and DOHSA do not apply, and federal courts generally look to DOHSA's schedule of beneficiaries when deciding who has standing to recover damages in a *Moragne* action, the parents were entitled to loss of society as an element of damages regardless of dependency.[396]

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389. *Earles II*, 26 F.3d at 915.

390. *Id.* at 915-17.

391. *Id.* at 915.

392. *Id.*

393. *Id.*

394. 4 F.3d 1084 (2d Cir. 1993) (holding that the non-dependent parents of a non-seaman killed in territorial waters could not recover loss of society damages under general maritime law), *cert. denied*, 114 S. Ct. 1060 (1994).

395. *Earles II*, 26 F.3d at 916 (emphasis added); *see also* 46 U.S.C. app. §§ 761-68 (1988); Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084, 1090-91 (2d Cir. 1993).

396. *Earles II*, 26 F.3d at 916; *but see infra* notes 534-43 and accompanying text for a discussion on factors admiralty courts might consider in determining whether a beneficiary could recover for loss of society.

2. *Dependency Is Not a Factor When Awarding Loss of Society Damages in a General Maritime Wrongful Death Action*

The government relied on a dependency rule, arguing: (1) that in *Higginbotham*, the Supreme Court dared litigants to challenge the propriety of loss of society damages in the future if they became "a substantial part of the survivor's recovery,"[397] (2) that a broad reading of the uniformity rationale expressed by the Court in both *Higginbotham* and *Miles* that asserted recovery should be uniform between the federal statutes and *Moragne* actions was required, and (3) for adherence to the language of *Miles* which dictates that lower courts look to the Jones Act and DOHSA for policy guidance.[398] The Ninth Circuit noted that *Higginbotham* sanctioned non-uniform recovery of damages between territorial waters cases and high seas cases in order to comply with DOHSA's limitation to pecuniary damages.[399] The Ninth Circuit disagreed with the government's claim that post-*Miles*, courts must look to both the Jones Act and DOHSA for policy guidance, and likewise deny loss of society damages to non-dependents.[400] Indeed, the Ninth Circuit challenged the government's reliance on a dependency rule explaining that the dependency policy was derived from dicta in *Higginbotham* and *Miles*.[401]

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397. In *Earles II*, loss of society damages were a substantial part of the parents' recovery. *See supra* note 33 and accompanying text. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 127, at 952 n.81 (5th ed. 1984) (noting that the Supreme Court's dicta in *Higginbotham*, whether awards for loss of society must be primarily symbolic rather than a substantial portion of recovery, has not yet been decided).

398. *Earles II*, 26 F.3d at 915-16. Both statutes limit recovery to pecuniary damages. 46 U.S.C. app. § 688 (1988); 46 U.S.C. app. §§ 761-68 (1988).

399. *Earles II*, 26 F.3d at 915-16; *see also* Opening brief for Appellant at 40-45, *Earles II* (No. 92-55548).

400. *Earles II*, 26 F.3d at 915-16.

401. *Id.* at 915-16.

3. *Uniformity of Recovery in a General Maritime Wrongful Death Action is Not Compelled by Supreme Court Jurisprudence Unless Damages are Otherwise Controlled by Statute*

The Ninth Circuit synthesized the Supreme Court's reasoning under *Gaudet-Higginbotham-Miles*, deriving the rule that uniformity of recovery was a factor in a *Moragne* action only if the damages awarded conflicted *directly* with either of the federal maritime wrongful death statutes.[402] The court noted, "the results in *Higginbotham* and *Miles* were clearly dictated by statute, and neither statute limits the damages recoverable for death in territorial waters that were authorized by *Gaudet*."[403] Thus, the court's reasoning suggests that when the federal maritime statutory scheme does not apply, the maritime case law that interprets it does not either.[404] By reasoning that both *Higginbotham* and *Miles* were dictated by statute, the Ninth Circuit dismissed those holdings' emphasis on uniformity, thereby making headway toward the conclusion in *Earles II* that loss of society damages could be awarded regardless of dependency.[405]

4. *Uniformity and Special Solicitude Do Not Preclude Non-Seamen's Beneficiaries from Recovering Damages Denied to Beneficiaries of Seamen*

The Ninth Circuit addressed the assertion that the court should adopt the government's approach because it is the same approach to loss of society used by the Second, Fifth, and Sixth

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402. *Id.* at 916 (emphasis added).

403. *Id.*

404. *See id.*; *but see* Miles v. Apex Marine Corp., 498 U.S. 19, 26-27 (1990) (noting that admiralty courts that "supplement" statutory remedies in maritime wrongful death actions must do so to achieve uniform vindication of national policy); Mobil Oil v. Higginbotham, 436 U.S. 618, 625 (1978) (noting that since Congress has never enacted a comprehensive maritime code, courts that award maritime wrongful death damages must do so in a way that preserves the uniformity of maritime law); Moragne v. States Marine Lines, 398 U.S. 375, 397-409 (1970) (noting that when awarding non-statutory remedies, the courts should look to DOHSA and the Jones Act for guidance).

405. *See Earles II*, 26 F.3d at 916-17.

Circuits.[406] The court disagreed with the Second Circuit's holding in *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, which declined to award loss of society damages to the non-dependent parents of a non-seaman killed in territorial waters.[407] The Ninth Circuit explained that the Second Circuit's reasoning in *Wahlstrom* was in the interest of uniformity between recovery for the deaths of seamen and non-seamen in territorial waters.[408] The court noted that the Second Circuit had considered the interest of special solicitude to seamen by reasoning that the recovery allowed to beneficiaries of non-seamen should not be more generous than the recovery allowed to seamen's beneficiaries which is limited to pecuniary loss under the Jones Act, and therefore precludes loss of society damages.[409]

The Ninth Circuit declared itself free from the guiding principle of uniformity that the Second Circuit had found compelling in *Wahlstrom*, because, unlike the Second Circuit, the Ninth Circuit found that *Miles* did not control.[410] The court reiterated that, because the facts of *Miles* involved a seaman, the Court in *Miles* was constrained to limit damages under the Jones Act, whereas the court in *Earles II*, dealing with non-seamen, was free to fashion its own remedy, even if inconsistent with the remedial statutes.[411] It bolstered this assertion by pointing out that the Supreme Court created inconsistent recovery for death of non-seamen between territorial waters and the high seas by its holdings in *Gaudet* and *Higginbotham*.[412] Thus, because the decedents in *Earles II* were non-seamen, the principle of statutory uniformity as applied in the seaman context under *Miles* was not a compelling factor in the court's analysis.[413]

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406. *Id.* at 916; Opening brief for Appellant at 40-45, *Earles II* (No. 92-55548).

407. *Earles II*, 26 F.3d at 916; *see also* Walker v. Braus, 861 F. Supp. 527, 536-37 (E.D. La. 1994) (declining to follow *Earles II*), *remand before decision*, 995 F.2d 77 (5th Cir. 1993); *see supra* notes 10, 358-73 and accompanying text for a discussion on *Wahlstrom*.

408. *Earles II*, 26 F.3d at 916-17.

409. *Id.* The Ninth Circuit clarified that the Second Circuit's decision in *Wahlstrom* was based on the *Wahlstrom* court's expansive interpretation of the uniformity principle that the Supreme Court declared in *Miles*. *Id.* at 917.

410. *Id.*

411. *Earles II*, 26 F.3d at 917.

412. *Id.*

413. *See id.* at 915-17.

5. *The "Humane and Liberal Character of Proceedings in Admiralty" Justify Extending Loss Of Society Damages to Non-Dependent Beneficiaries of Non-Seamen*

The Ninth Circuit declined to interpret the law as drawing any distinction between dependents and non-dependents for the purpose of awarding loss of society in a *Moragne* action for death of non-seamen in territorial waters.[414] The court noted, "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."[415] Implicit in the court's reasoning was recognition of its own special role in the evolution of maritime jurisprudence as not merely supplemental, but appointed with the power to develop substantive rules.[416] Therefore, although it was a matter of first impression for the Ninth Circuit, the court found that because the issue was not directly preempted by statute, extending loss of society to non-dependents was consistent with its authority to fashion liberal remedies in the general maritime law.[417] Moreover, the court concluded that any lack of uniformity created by *Earles II* was the result of the clash between Congress' statutory enactments under the Jones Act and DOHSA, and the Supreme Court's rules of decision in *Moragne* and *Gaudet*.[418]

V. CRITIQUE

In *Earles II*, the Ninth Circuit held that the beneficiaries of non-seamen killed in territorial waters may recover loss of society damages regardless of dependency.[419] The Supreme Court has ruled that beneficiaries of Jones Act seamen cannot recover loss of society damages.[420] The *Earles II* decision cre-

414. *Earles II*, 26 F.3d at 917.

415. *Id.* (quoting The Sea Gull, 21 F. Cas. 909, 910 (C.C.D. Md. 1865)).

416. *See id.*; *see also* In re Oswego Barge Corp., 644 F.2d 327, 335-36 (2d Cir. 1981) (noting that the Supreme Court has approved the creation of new rights pursuant to federal court-made maritime law more forcefully than in other areas of federal court-made law), *reh'g denied*, 673 F.2d 47 (2d Cir. 1982).

417. *Earles II*, 26 F.3d at 917.

418. *Id.*

419. Sutton v. Earles ("Earles II"), 26 F.3d 903, 920 (9th Cir. 1994), *remand before appeal*, Earles v. United States ("Earles I"), 935 F.2d 1028 (9th Cir. 1991).

420. Miles v. Apex Marine Corp., 498 U.S. 19 (1990) (holding that the parent of

ated anomalous recovery within the Ninth Circuit and a split between the Ninth Circuit and the other circuits.[421] The Ninth Circuit's holding, therefore, is at odds with the spirit of maritime uniformity.[422] More disturbing, the rule is in conflict with the ancient maritime principle that seamen are the "wards of admiralty" and are therefore entitled to its most generous protection, special solicitude.[423]

Notwithstanding the misapplication of the principles of uniformity and special solicitude, the Ninth Circuit's *Earles II* decision awarded loss of society damages to beneficiaries of non-seamen without requiring the district court to conduct a factual analysis of loss.[424] Whether to award loss of society in maritime wrongful death law is a question that strikes at the heart of a greater debate in American jurisprudence: whether

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a seaman killed in territorial waters could not recover loss of society damages under general maritime law).

421. *See* Walker v. Braus, 861 F. Supp. 527, 536 (E.D. La. 1994), *remand before appeal*, 995 F.2d 77 (5th Cir. 1993); *see also* Miles v. Melrose, 882 F.2d 976, 989 (5th Cir. 1989), *aff'd sub nom.* Miles v. Apex Marine Corp., 498 U.S. 19 (1990) (holding that the non-dependent parent of a seaman killed in territorial waters could not recover loss of society damages under general maritime law); *but cf. Earles II*, 26 F.3d at 914-17. *See supra* notes 14, 49-55 and accompanying text for a discussion of uniformity.

422. *See* Walker v. Braus, 861 F. Supp. 527, 536 (E.D. La. 1994), *remand before appeal*, 995 F.2d 77 (5th Cir. 1993); *see also* Miles v. Melrose, 882 F.2d 976, 989 (5th Cir. 1989) (holding that the non-dependent parent of a seaman killed in territorial waters could not recover loss of society damages under general maritime law), *aff'd sub nom.* Miles v. Apex Marine Corp., 498 U.S. 19 (1990); *but cf. Earles II*, 26 F.3d at 914-17. *See supra* notes 14, 49-55 and accompanying text for a discussion of uniformity.

423. *See Walker*, 861 F. Supp. at 536-38 (noting that persons that sue in admiralty are permitted no greater "solicitude" than seamen, and that by allowing non-seamen recovery for loss of society that seamen's beneficiaries are not allowed, the *Earles II* court implicitly denied the driving principles behind creating a federal maritime law cause of action for wrongful death in the first place); *see also* Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084, 1093 (2d Cir. 1993) (holding that the non-dependent parents of non-seamen killed in territorial waters could not recover loss of society damages under general maritime law due to considerations of uniformity), *cert. denied*, 114 S.Ct. 1060 (1994); Anderson v. Whittaker Corp., 894 F.2d 804, 811 (6th Cir. 1990) (noting that by denying non-dependent parents of non-seaman recovery for loss of society, the aim of special solicitude *to seamen* was not unduly effected, and that the principle of uniformity was furthered); *cf.* Miles v. Melrose, 882 F.2d 976, 987-89 (5th Cir. 1993) (holding that the non-dependent parent of a seaman killed in territorial waters could not recover loss of society damages under general maritime law), *aff'd sub nom.* Miles v. Apex Marine Corp., 498 U.S. 19, 33-37 (1990).

424. *Earles II*, 26 F.3d at 914-17.

the purpose of the judicial system is to compensate tort victims for their pecuniary loss only, or whether it is to effectuate the public policy of awarding damages for more intangible losses.[425] Although measuring the quantum of intangible losses is problematic, it appears that in *Earles II*, the Ninth Circuit was led to include recovery for loss of society under general maritime law to anyone with standing.[426] Moreover, the broad rule adopted in *Earles II* now applies to all general maritime wrongful death cases within the Ninth Circuit.[427]

A. ANOMALIES CREATED BY THE *EARLES II* RULE

The *Earles II* damages rule leads to anomalies in maritime recovery within the Ninth Circuit, and among recovery allowed in other federal circuits, by allowing non-dependent beneficiaries of non-seamen to recover loss of society damages while dependent beneficiaries of seamen are denied such recovery.[428] Ironically, non-uniform recovery is precisely what led the Supreme Court, in *Moragne*, to create a cause of action for wrongful death of non-seamen killed in territorial waters.[429] Moreover, in *Miles*, the Supreme Court re-affirmed that basic

425. *See* STUART M. SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH AND INJURY §§ 3:1, 3:50, at 5-19, 221-39 (3rd ed. 1992).

426. *See* Zicherman v. Korean Air Lines Co., Ltd., No. 93-7490, 1994 WL 685690, at *3-4 (2d Cir. Dec. 5, 1994) (remanding an award for loss of society for a trial on the dependency issue); *Walker*, 861 F. Supp. at 537-38 (holding that the beneficiaries of non-semen killed in territorial waters could not recover loss of society consistent with the guiding principle of special solicitude to seamen); Miles v. Apex Marine Corp., 498 U.S. 19, 33-37 (1990) (holding that the parent of a seaman killed in territorial waters could not recover loss of society damages under general maritime law due to considerations of uniformity); *cf. Earles II*, 26 F.3d at 914-17.

427. *See Earles II*, 26 F.3d at 920.

428. *See* Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1407 (9th Cir. 1994); *see also* Davis v. Bender Shipbuilding, 27 F.3d 426, 426-30 (9th Cir. 1994); Walker v. Braus, 861 F. Supp. 527, 536 (E.D. La. 1994) (noting that *Miles* was decided to remedy anomalies in maritime wrongful death recovery, and that the current non-uniformity as a result of *Earles II* is analogous to one anomaly the Court found compelling when it decided to create a general maritime law cause of action for wrongful death in *Moragne*), *remand before decision*, 995 F.2d 77 (5th Cir. 1993).

429. Moragne v. States Marine Lines, 398 U.S. 375, 395-96 (1970) (noting that the Court's holding which recognized a general maritime wrongful death action was compelled partly to remedy the anomaly that — contrary to settled admiralty law tenets — Jones Act seamen were, at that time, extended less protection under maritime law than other suitors).

approach to maritime remedies when it counseled lower courts not to award non-uniform damages within maritime wrongful death actions of Jones Act seamen.[430]

1. *Anomalous Recovery Within The Ninth Circuit*

In the Ninth Circuit, the anomalous holding in *Earles II* may be illustrated by *Davis v. Bender Shipbuilding*,[431] a case the Ninth Circuit decided the same month as *Earles II*. In *Earles II*, the court, unconstrained by either the Jones Act or DOHSA, fashioned "humane and liberal remedies" for the beneficiaries of non-seamen.[432] The *Davis* holding was significant because the court applied the uniformity component of *Miles* broadly, declining to extend loss of future earnings in a survival action brought under general maritime law on behalf of the estates of two deceased seamen.[433] Thus, even though the Jones Act and DOHSA did not apply, in *Davis*, the Ninth Circuit refused to extend recovery to the seamen's estates; whereas in *Earles II*, the court extended recovery for loss of society to the beneficiaries of non-seamen.[434]

The next case the Ninth Circuit considered regarding loss of society damages, *Chan v. Society Expeditions, Inc.*,[435] was decided on July 27, 1994. In Chan, the Ninth Circuit decided the issue of whether the dependent family members of a non-

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430. Miles v. Apex Marine Corp., 498 U.S. 19, 33 (1990) (noting that the Court's holding which denied loss of society benefits to the non-dependent mother of a seaman killed in territorial waters restored a uniform rule applicable to all wrongful death actions available to seamen).

431. 27 F.3d 426 (9th Cir. 1994).

432. *Earles II*, 26 F.3d at 917.

433. Davis v. Bender Shipbuilding, 27 F.3d. 426, 430 (9th Cir. 1994).

434. *Id.* at 430. The Jones Act did not apply in *Davis*, because the suit was not against the seaman's employer, and therefore was not against a Jones Act defendant. *Id.*

435. 39 F.3d 1398 (9th Cir. 1994) (declining to award loss of society damages to the dependent family members of a non-seaman injured on the high seas because of DOHSA's denial of such recovery to the beneficiaries of those killed on the high seas, coupled with the Supreme Court's emphasis on uniformity of damages among maritime tort actions in *Miles*). It should be noted that as originally released *Chan* conflicted directly with *Earles II*, therefore, subsequent to July 1994, *Chan* was re-released to comport with *Earles II*. *See* Chan v. Society Expeditions, Inc., 1994 A.M.C. 2642 (9th Cir. 1994) (reporting the Ninth Circuit's decision in *Chan* as originally released).

seaman could recover loss of society in a personal injury case.[436] The case arose in connection with the capsizing of an inflatable raft which ferried passengers from a cruise ship to an atoll in the South Pacific, near Tahiti.[437] Benny Chan, the injured father of the family, suffered brain damage as a result of the accident.[438] The court held that in the interest of uniformity as emphasized in *Miles*, a seaman case, the family members of a non-seaman injured on the high seas could not recover loss of society.[439]

In *Chan*, the Ninth Circuit noted that it must "look for guidance to congressional enactments in the field of maritime law."[440] The court further noted it should also be guided by the "twin aims" of maritime law, uniformity and special solicitude.[441] The court announced that because the accident took place on the high seas, the remedial provisions of DOHSA were instructive, and that DOHSA did not allow non-pecuniary damages.[442] In *Chan*, however, DOSHA did not apply because the victim was injured rather than killed.[443] Likewise, since the accident in *Earles II* had taken place in territorial waters, rather than on the high seas, DOHSA did not apply in that case either.[444] Nevertheless, in *Earles II*, the Ninth Circuit extended recovery *because* DOHSA did not apply, while in *Chan*, the court declined to award loss of society damages *even though* DOHSA did not apply.[445]

In concluding that loss of society was not allowed in *Chan*, a non-seaman case, the Ninth Circuit sought to serve the goal of uniformity of damages in maritime cases that the Supreme

436. Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1407-08 (9th Cir. 1994). There is no distinction between fatal and non-fatal injuries when awarding loss of society damages under general maritime law. Cater v. Placid Oil, 760 F. Supp. 568, 571 (E.D. La. 1991).

437. *Chan*, 39 F.3d at 1401-02.

438. *Id.*

439. *Id.* at 1408.

440. *Id.* at 1407.

441. *Id.*

442. *Chan*, 39 F.3d at 1407.

443. *Id.*

444. *Earles II*, 26 F.3d at 915.

445. *Chan*, 39 F.3d at 1408; *but see Earles II*, 26 F.3d at 917.

Court emphasized in *Miles*, a seaman case.[446] However, faced with an analogous decision in *Earles II*, the Ninth Circuit de-emphasized the uniformity component of *Miles*, because *Miles* was a seaman's case, while *Earles II*, involved non-seamen.[447] Yet, as in *Earles II*, the accident in *Chan* also involved non-seamen.[448] Thus, it is anomalous that in both cases neither the Jones Act nor DOHSA applied, yet, in *Earles II*, the Ninth Circuit awarded loss of society damages, while one month later, in *Chan*, the court denied such recovery.[449]

2. *Split Circuits*

The circuits are split over when, or whether, federal courts can award loss of society damages in a maritime wrongful death action.[450] The unfair treatment of Jones Act seaman in the *Earles II* decision is accentuated when contrasted with the First Circuit case, *Rollins v. Peterson Builders, Inc.*[451] In *Rollins*, the strong bond between the decedent-seaman and her beneficiary-mother had been painstakingly demonstrated to the court, whereas in *Earles II* there was little evidence of mutually supportive relationships between the five decedents and their parents.[452] When not "shipping-out," the decedent in *Rollins* lived at home.[453] At least two of the decedents in *Earles II* did not live with their parents, and as to the other three, no evidence of common residency was established.[454] Furthermore, with regard to one of the decedent's in *Earles II*, the record established that he had no contact with his non-dependent father-beneficiary for several years prior to his

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446. *Earles II*, 26 F.3d at 908; *Miles*, 498 U.S. at 32-33.

447. *Earles II*, 26 F.3d at 914-17; *Miles*, 498 U.S. at 32-33.

448. *Chan*, 39 F.3d at 1401-02; *Earles II*, 26 F.3d at 908.

449. *See Chan*, 39 F.3d at 1407-08; *but cf.* Emery v. Rock Island Boatworks, Inc., 847 F. Supp. 114, 116-18 (E.D. Ill. 1994) (holding that the spouse of a non-seaman injured in state waters could recover loss of society damages because neither the Jones Act nor DOHSA precluded or limited damages).

450. *See supra* notes 10, 136-37 and accompanying text for a discussion on the split among circuits.

451. Rollins v. Peterson Builders, Inc., 761 F. Supp. 918 (D.R.I. 1990).

452. *See Rollins*, 761 F. Supp. at 920; Earles v. United States ("Earles I"), 935 F.2d 1028 (9th Cir. 1991).

453. *Rollins*, 761 F. Supp. at 920.

454. *See* Proposed Findings of Fact and Conclusions of Law for Appellant at 15-20, *Earles II* (No. 92-55548).

death, and he contributed no support whatsoever to his beneficiary-mother.[455] Finally, the tragic electrocution of the decedent in *Rollins* occurred within the course and scope of her employment as a seaman, while the accident in *Earles II* resulted in part from a night of heavy drinking and the criminal negligence of one of the plaintiffs.[456] Moreover, the accident in *Rollins* happened while the decedent's mother had just boarded the research vessel in order to greet her daughter after an extended sea voyage.[457]

Arguably, when maritime rules are replaced by factors that the majority of state and federal courts apply when determining whether to award loss of society damages,[458] and those factors are applied to the facts of *Rollins* and *Earles II*, it appears that recovery in *Rollins* was more justified than in *Earles II*.[459] Yet, in *Earles II* substantial recovery for loss of society was awarded, while in *Rollins*, recovery for loss of society was denied because of outmoded and inflexible maritime statutory constraints coupled with the Supreme Court's recent decision in *Miles*.[460] Essentially, recovery was denied in *Rollins*, *because* the decedent was a seaman.[461]

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455. *See* Proposed Findings of Fact and Conclusions of Law for Appellant at 20, *Earles II* (No. 92-55548).

456. *See supra* notes 17-24 and accompanying text for a discussion on the facts of *Earles II*.

457. *Rollins*, 761 F. Supp. at 920.

458. *See infra* note 535 for a list of factors admiralty courts might consider in determining whether a beneficiary could recover for loss of society.

459. *See* Sutton v. Earles ("Earles II"), 26 F.3d 903, 917 n.18 (9th Cir. 1994); *Rollins*, 761 F. Supp. at 929.

460. *See Rollins*, 761 F. Supp. at 929; *supra* note 33 and accompanying text for the amount of loss of society damages awarded in *Earles II*.

461. *See Rollins*, 761 F. Supp. at 929. The Ninth Circuit in *Earles II* misrepresented the ultimate holding in *Rollins*, which denied non-dependent parents of a *seaman* standing to recover loss of society under general maritime law, by citing it for the proposition that loss of society could be awarded to beneficiaries of *non-seamen* regardless of dependency. *See Earles II*, 26 F.3d at 917 n.18. An accurate reading of *Rollins* reveals the district court's rationale for attempting to extend recovery for loss of society to the non-dependent mother was that:

> *Gaudet* . . . already determined that . . . [special] solicitude warrants an award of loss of society damages to a *spouse* of a *seaman* who is . . . killed. It is a small step indeed to find that *the same solicitude* should extend to the *parents* of a deceased *seaman*. . . .

Rollins, 761 F. Supp. at 924 (emphasis added); *see* KIPLING, *supra* note 1, at 216.

a. Fifth Circuit

A district court deciding a case on remand from the Fifth Circuit has directly criticized the decision in *Earles II*.[462] In *Walker v. Braus*[463] the court declined to follow *Earles II*, because the court reasoned that the Ninth Circuit's holding in *Earles II* was inconsistent with the Supreme Court's decision in *Miles*.[464] The court explained that *Earles II* created non-uniform recovery, within the Ninth Circuit, based on status of the decedent.[465] The *Walker* Court cited *Smith v. Trinidad Corp.* as an example of such non-uniformity, because the Ninth Circuit, just one year prior to *Earles II*, held that the uniformity requirement of *Miles* compelled the conclusion that the spouse of an injured seaman could not recover for loss of society under general maritime law.[466] The court continued, "[*Earles II*] therefore creates an anomaly in the Ninth Circuit: The beneficiaries of seamen — traditionally the wards of admiralty — cannot recover damages that beneficiaries of non-seamen are permitted to recover. The Supreme Court's decision in *Miles* was designed to eliminate these kinds of inconsistent results."[467] With this declaration, the district court, by direction of the Fifth Circuit, aligned itself with the Second Circuit's holding in *Wahlstrom* and the Sixth Circuit's holding in *Anderson*, declining to award loss of society damages to the non-dependent beneficiaries of non-seamen killed in territorial

462. Walker v. Braus, 861 F. Supp. 527 (E.D. La. 1994) (holding that the beneficiaries of a non-seaman killed in territorial waters could not recover loss of society damages under general maritime law), *remand before decision*, 995 F.2d 77 (5th Cir. 1993).

463. 861 F. Supp. 527 (E.D. La. 1994), *remand before decision*, 995 F.2d 77 (5th Cir. 1993).

464. *Walker*, 861 F. Supp. at 536.

465. *Id.*

466. *Id.*; *see* Smith v. Trinidad Corp., 992 F.2d 996 (9th Cir. 1993) (holding that the wife of an injured seaman could not recover loss of society damages under the maritime law); *see also supra* notes 305-11 and accompanying text for a discussion on *Smith*.

467. *Walker*, 861 F. Supp. at 536.

waters.[468]

b. Second Circuit

The Second Circuit has recently re-affirmed its policy for awarding loss of society in general maritime law when neither DOHSA nor the Jones Act apply.[469] In *Zicherman v. Korean Air Lines*[470] and *Air Disaster at Lockerbie Scotland on December 21, 1988* (*"Lockerbie"*),[471] the Second Circuit applied federal maritime law to the downings of two transoceanic airline flights.[472] The court in *Zicherman* held that the non-dependent relative of one of the victims could not recover loss of society damages, and remanded the award made to another relative pending disposition of a trial on the dependency issue.[473] The court in *Lockerbie* held that loss of society damages were allowed to the spouse and dependent children of one of the victims, but declined to award loss of society to the family of another victim, because the claimants included non-dependent adult children of the decedent.[474] The Second Circuit, in both cases, cited *Miles*, *Sistrunk*, and *Anderson* for the proposition that general maritime law extends loss of society to no one

468. *See supra* notes 10, 136-37 and accompanying text for a discussion on the split among circuits.

469. Zicherman v. Korean Air Lines Co., Ltd., No. 93-7490, 1994 WL 685690, at *3-4 (2d Cir. Dec. 5, 1994) (holding that federal maritime law does not allow recovery for loss of society to non-dependent family members); Air Disaster at Lockerbie Scotland on December 21, 1988, 37 F.3d 804, 828-30 (2d Cir. 1994) (holding that federal maritime law does not allow recovery for loss of society to non-dependent family members).

470. No. 93-7490, 1994 WL 685690, at *3-4 (2nd Cir. Dec. 5, 1994).

471. 37 F.3d 804, 828-30 (2nd Cir. 1994).

472. *Zicherman*, 1994 WL 685690, at *3-4; *Lockerbie*, 37 F.3d at 828-30. American courts apply the general maritime law to the issue of damages in an international air disaster because, under the Warsaw Convention, damages are measured according to the internal law of the party to the convention. *Lockerbie*, 37 F.3d at 828-30. United States District Courts apply maritime case law when holding that a federal action for wrongful death exists under the Warsaw Convention, because the general maritime law is one of the oldest bodies of federal judge-made law. *Id.* *See* In re Mexico City Aircrash of October 31, 1979, 708 F.2d 400, 414-15 (9th Cir 1983); *see also supra* note 3. Therefore, the general maritime law is the appropriate body of federal law to apply when deciding whether to include loss of society damages under the Warsaw Convention. *Lockerbie*, 37 F.3d at 828-30.

473. *Zicherman*, 1994 WL 685690, at *3-4.

474. *Lockerbie*, 37 F.3d at 828-30.

other than spouses and dependents.[475]

Zicherman and *Lockerbie* affirm the Second Circuit's adherence to the dependency rule for awarding loss of society damages in general maritime law despite the Ninth Circuit's earlier decision in *Earles II*.[476] Moreover, by remanding the trial court's award of loss of society to one of the relatives of the decedent for a determination on the dependency issue, the Second Circuit demonstrated that some factual analysis of loss must be undertaken.[477] *Zicherman* and *Lockerbie* thus add to the proposition that dependency has developed into a principle factor when awarding loss of society damages under the general maritime law, and illustrate the present split in the circuits caused by the Ninth Circuit's *Earles II* decision.[478]

B. THE NINTH CIRCUIT'S DECISION IN *EARLES II* IS INCONSISTENT WITH CURRENT SUPREME COURT JURISPRUDENCE ON AWARDING LOSS OF SOCIETY DAMAGES IN MARITIME WRONGFUL DEATH ACTIONS

Arguably, the Ninth Circuit in *Earles II* misapplied the Supreme Court's approach to uniform recovery under general maritime law, as announced in *Miles v. Apex Marine Corp.*, and misapplied the doctrine of special solicitude.[479] In *Earles II*, the Ninth Circuit noted that, albeit *sub silentio*, the Supreme Court had sanctioned non-uniform recovery in general maritime wrongful death actions when, in *Higginbotham*, the Court foreclosed loss of society damages to the beneficiaries of

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475. *Zicherman*, 1994 WL 685690, at *3; *Lockerbie*, 37 F.3d at 830. The court in *Lockerbie* stated, "We find no maritime case extending loss of society damages to plaintiffs other than spouses and dependents." *Lockerbie*, 37 F.3d at 830. Apparently the court was not aware of the Ninth Circuit's holding in *Earles II*.

476. *See Earles II*, 26 F.3d at 914-17; *see supra* note 10 and accompanying text.

477. *See Zicherman*, 1994 WL 685690, at *3-4; *See infra* notes 534-43 and accompanying text for a discussion on factors admiralty courts might consider in determining whether a beneficiary could recover for loss of society.

478. *See Earles II*, 26 F.3d at 914-17.

479. *See* Walker v. Braus, 861 F. Supp. 527, 31-38 (E.D. La. 1994), *remand before decision*, 995 F.2d 77 (5th Cir. 1993) (holding that the beneficiaries of a non-seaman killed in territorial waters could not recover loss of society damages under general maritime law); *see also* Miles v. Apex Marine Corp., 498 U.S. 19, 33-37 (1990) (holding that the non-dependent parent of a seaman killed in territorial waters could not recover loss of society damages under general maritime law).

those killed on the high seas, while not overruling *Gaudet* which allowed such recovery to the beneficiaries of those killed in territorial waters.[480] However, since the Supreme Court ruled on the propriety of non-uniform damages in actions brought by the beneficiaries of Jones Act seamen in *Miles*, the Court has not spoken on whether the elements of damages permitted to wrongful death beneficiaries of non-seamen may differ from the recovery allowed to the beneficiaries of seamen.[481]

1. *The Ninth Circuit Misapplied the Doctrine of Uniformity*

There appears to be no good reason for requiring uniformity between elements of damages allowed to beneficiaries of seamen and those allowed to beneficiaries of non-seamen.[482] However, if there must be non-uniform recovery, recovery allowed to seamen's beneficiaries should not be less than that awarded to the beneficiaries of non-seamen, because the rationale for awarding the beneficiaries of non-seamen extended damages is at odds with uniformity of the general maritime law, while the public policy granting seamen "special solicitude" is firmly rooted in jurisprudence and legislative enactment.[483] Although the notion of keeping the general maritime law current with developments in the common law is both a sound and persuasive reason for developing the law of maritime damages,[484] uniformity and special solicitude together compel the conclusion that, if non-uniformity in maritime

480. *Earles II*, 26 F.3d at 916; *see* Mobil Oil v. Higginbotham, 436 U.S. 618, 622-26 (1978).

481. *See supra* notes 93-137 for a discussion on the Supreme Court's treatment of the loss of society issue under general maritime law. *See also infra* notes 483-95 for a discussion on the breadth of the constitutional doctrine of uniformity in general.

482. *Walker*, 861 F. Supp. at 537-38 n.14; *see supra* notes 1, 5, 14, 47-55, 79-82 and accompanying text for a discussion on the principles of uniformity and special solicitude.

483. *See supra* notes 5, 47-48 and accompanying text for a discussion on special solicitude.

484. It is arguable that the Ninth Circuit's decision in *Earles II* was not an attempt at developing the general maritime law consistent with the common law, because it is apparently not the majority rule outside of admiralty jurisdiction to award loss of society type damages regardless of factors tending to prove loss, such as financial dependency. *See* STUART M. SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH AND INJURY §§ 3:1, :50, at 5-19, 221-39 (3d ed. 1992).

wrongful death recovery is to be sanctioned, recovery allowed to seamen's beneficiaries should not be less than that awarded to the beneficiaries of non-seamen.[485]

The grant of admiralty jurisdiction itself supports the argument that uniformity between damages for seamen and non-seamen may require that recovery for non-seamen should not be greater than that allowed to seamen.[486] One year prior to deciding *Miles*, the Supreme Court decided *Sisson v. Ruby*,[487] the most recent case in a long line of cases clarifying when admiralty tort jurisdiction arises for the purpose of applying the general maritime law.[488] Significant to the argument that seamen's recovery should be at least uniform with non-seamen's recovery, the Court discussed the scope and application of the principle of uniformity:

> Although we recognized that protecting commercial shipping is at the heart of admiralty jurisdiction, we also [note] that that interest 'cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules. . . . The failure to recognize the breadth of this federal interest ignores the potential effect of non-commercial maritime activity on maritime commerce. The potential disruptive impact of a collision between two boats on navigable waters, . . . compels the conclusion that [a] . . . collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.[489]

Thus, it can not be ignored that the Supreme Court has recently spoken on the "breadth" of the principle of uniformity in general, and has held that the principle of uniformity, in at

485. *See Anderson*, 894 F.2d at 811-12; *see also Wahlstrom*, 4 F.3d at 1090-93; *Walker*, 861 F. Supp. at 535; *but see Earles II*, 26 F.3d at 916-17.

486. *See* Sisson v. Ruby, 497 U.S. 358 (1990).

487. 497 U.S. 358 (1990) (clarifying the test used to determine when admiralty tort jurisdiction applies).

488. *Sisson*, 497 U.S. at 362.

489. *Id.* (emphasis in original).

least one context, applies equally between pleasure boaters, such as the decedents in *Earles II*, and commercial mariners, such as Jones Act seamen.[490]

The question presents itself: Why does the present anomaly in damages recovery exist? Although today, the Jones Act's limitation on non-pecuniary damages appears draconian, when Congress enacted the Jones act in 1920, the act was consistent with the principle of "special solicitude."[491] However, by adopting the Jones Act, Congress dropped anchor on the law of seamen.[492] As a result, the law of seamen has not progressed with more modern and liberal ideas concerning recovery.[493] Thus, perhaps the best explanation for the current anomaly is that admiralty courts, in trying to keep pace with common law developments outside the maritime context, have incorporated current common law developments into the general maritime law, but are unable or unwilling to do so when constrained by outdated statutes.[494] The Ninth Circuit's decision in *Earles II* is one example of this incorporation.[495] As the court in *Earles II* suggested, because the history of maritime law shows that the courts have been ordained with great power to develop the law, it follows that the courts need not develop the law in a manner entirely consistent with legislative intent, but must do

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490. *Id.*

491. The Jones Act was a progressive act when enacted as evinced by the fact that it allowed plaintiffs a negligence action against their employer under a "pure comparative fault" standard of liability. *See* The Arizona v. Anelich, 298 U.S. 110, 119-24 (1936); 46 U.S.C. app. § 688 (1988). Traditional common law tort defenses, such as assumption of the risk, were therefore not a bar to recovery under the Jones Act. *The Arizona*, 298 U.S. at 119-24. *See supra* notes 79-82 and accompanying text for a discussion of special solicitude for seamen.

492. *See Miles*, 498 U.S. at 33-37 (1990) (loss of society not allowed to a seaman's mother); *cf. Earles II*, 26 F.3d at 914-17 (loss of society extended to non-dependent parents of non-seamen).

493. *See Miles*, 498 U.S. at 33-37 (1990) (loss of society not allowed to a seaman's mother); *cf. Earles II*, 26 F.3d at 914-17 (loss of society extended to non-dependent parents of non-seamen).

494. *See Earles II*, 26 F.3d at 914-17. One commentator has noted that, "[g]iven the embryonic stage of seaman's rights under the general maritime law in 1920," the better question to ask when awarding damages is: What was Congressional intent at that time as to incorporating future rights of recovery as they develop in the common law? Steven G. Flynn, *Punitive Damages After* Haslip *&* Miles v. Apex Marine*: Allowable for Everyone but Seamen?*, 5 U.S.F. MAR. L.J. 155, 165 (1992).

495. *See Earles II*, 26 F.3d at 914-17.

so in a way so as to achieve justice.[496] Disturbingly, in *Earles II*, this charge conflicted with the uniformity of general maritime law.[497]

2. *The Ninth Circuit Misapplied the Doctrine of Special Solicitude*

The leading case advocating liberal remedies in admiralty, *The Sea Gull*,[498] was decided in 1865. In *The Sea Gull*, the husband of a woman killed in a collision between vessels on Chesapeake Bay filed an action seeking damages against the SEA GULL *in rem*, the alleged tortious vessel.[499] The lower court applied the prevailing common law rule at the time, that a cause of action dies with its possessor.[500] On appeal, Justice Chase explained that the rule against wrongful death was a species of common law.[501] The appeals court asserted that although the common law was generally opposed to wrongful death claims, equity and general principles of natural law were in favor.[502] Therefore, the court reasoned that because maritime law owes its heritage to the civil law and equity, and because equity favors such suits, "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."[503]

It is important to note that the policy the court advocated in *The Sea Gull* is not the same cause embraced by American maritime jurisprudence which considers seamen the "wards of admiralty" deserving of "special solicitude" for the hazards

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496. *Id.* at 917 (noting that, because neither the Jones Act nor DOHSA otherwise applied, the Ninth Circuit did not consider itself guided by the principle of uniformity, but rather by the humanitarian component of the general maritime law).

497. *See Miles*, 498 U.S. at 33-37; *see also Higginbotham*, 436 U.S. at 622-26; Sea-Land Services v. Gaudet, 414 U.S. 573, 585-90 (1974); Moragne v. States Marine Lines, 398 U.S. 375, 387-88, 397-402 (1970).

498. 21 F. Cas. 909 (C.C.D. Md. 1865) (the leading case employing broad language to advocate flexible remedies in admiralty proceedings).

499. The Sea Gull, 21 F. Cas. 909 (C.C.D. Md. 1865).

500. *Id.*

501. *Id.*

502. *Id.* at 910.

503. *Id.*

encountered in the every day service of their employment.[504] Today however, the two notions have apparently been made interchangeable by judicial confusion.[505] *Beadle v. Spencer*[506] and *The Arizona*,[507] are two cases that stand for the proposition that, because of the greater risks borne by seamen, their rights to recovery have traditionally been broader than those extended to non-seamen.[508] However, these cases do not embrace the policy that all who venture on the seas deserve special solicitude; these cases stand for the proposition that only those that make their living at sea do.[509] Therefore, it follows that the beneficiaries of seamen are intended to receive, at least uniform, if not greater recovery, than the beneficiaries of non-seamen.[510] The "humane and liberal character" of admiralty law notwithstanding, it is apparent that that is not the present state of the law in the Ninth Circuit.[511]

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504. *See The Sea Gull*, 21 F. Cas. at 910; *but cf.* Harden v. Gordon, 11 F.Cas. 480, 482 (C.C.D. Me. 1823).

505. *See Walker*, 861 F.Supp. at 537 n.14.

506. 298 U.S. 124 (1936) (noting that because of the greater risks borne by seamen, their rights to recovery have traditionally been broader than those recognized in land-based tort law); *but cf. Earles II*, 26 F.3d at 914-17.

507. 298 U.S. 110 (1936) (noting that because of the greater risks borne by seamen, their rights to recovery have traditionally been broader than those recognized in land-based tort law); *but cf. Earles II*, 26 F.3d at 914-17.

508. Beadle v. Spencer, 298 U.S. 124, 129-30 (1936); The Arizona, 298 U.S. 110, 119-24 (1936). *But see Miles*, 498 U.S. at 33-37 (loss of society not allowed to seaman's mother); *Earles II*, 26 F.3d at 914-17 (loss of society extended to non-dependent parents of non-seamen). *See supra* notes 5, 47-48 and accompanying text for a discussion of special solicitude toward seamen.

509. *See Beadle*, 298 U.S. at 129-30; The Arizona, 298 U.S. at 119-24; *see also Harden*, 11 F.Cas. at 482; Moragne v. States Marine Lines, 398 U.S. 375, 394 n.11. (1970). Although *Moragne* stands for the proposition that a wrongful death cause of action exists under the general maritime law, it is at least noteworthy that, in that case, the Court's humanitarian policy was extended to the beneficiary of a "*Sieracki* seaman." *Id.*; *see also, e.g.*, Sea-Land Services v. Gaudet, 414 U.S. 573, 585-90 (1974) (holding that the spouse of a "*Sieracki* seaman" killed in territorial waters could recover loss of society damages). *See supra* note 44. Although the Supreme Court in *Higginbotham* declined to award loss of society damages to the beneficiaries of a "longshoreman" based on the "preclusive effects" of DOHSA, it should be noted that, by the time of that case, the *Sieracki* seaman doctrine had been abolished. Mobil Oil v. Higginbotham, 436 U.S. 618, 625-26 (1978).

510. *See Earles II*, 26 F.3d at 914-17 (extending loss of society recovery to non-dependent parents of *non-seamen*); *but see* Davis v. Bender Shipbuilding, 27 F.3d 426 (9th Cir. 1994) (declining to award loss of society damages to the family members of a *seaman*); Smith v. Trinidad Corp., 992 F.2d 996 (9th Cir. 1993) (declining to award loss of society damages to the family members of a *seaman*).

511. *See, e.g., Earles II*, 26 F.3d at 917; *see supra* note 1 regarding seamen's rights.

Because the Supreme Court in *Gaudet* used broad language that did not limit loss of society only to longshoremen in territorial waters, many lower courts have interpreted *Gaudet* as extending "special solicitude" beyond seamen, to all who bring suit in admiralty jurisdiction.[512] However, this extension of solicitude to non-seamen is arguably incorrect because, both *Moragne* and *Gaudet* did not deal with "non-seamen," but more precisely dealt with "longshoremen," who at the time, courts were extending solicitude to as "*Sieracki* seamen."[513] Thus, it is arguable that *Moragne* and *Gaudet* were never intend to extended special solicitude beyond the realm of seamen, even though lower courts have since taken it upon themselves to do so by relying on these two cases.[514] Moreover, the extension of solicitude to non-seamen appears to be in derogation of the rationale behind the principle, which favors extended remedies for seamen based on settled public policy.[515] If Congress wishes to abandon this policy it should announce its intention to do so in a maritime tort reform package.[516] Until such time however, courts should take better care not to interpret the "special" out of "*special* solicitude."[517]

Derogation of the principle of special solicitude has resulted in a reversal of the rules between seamen and non-seamen.[518] In reaction to the interpretation that some courts have given to *Gaudet*, two prominent commentators have noted that, because *Gaudet* allowed greater recovery than that which had been previously available under the federal wrongful death

512. *See supra* notes 44, 510 and accompanying text for a discussion on the legal treatment of longshoremen and the extension of solicitude to non-seamen. *See, e.g., Earles II*, 26 F.3d at 917.

513. *See supra* note 44 for a discussion on the "*Sieracki* seaman" doctrine.

514. *See Walker*, 861 F. Supp. at 537 n.14.

515. See *supra* notes 5, 47-48, 79-82 and accompanying text for a discussion on the duel economic and humanitarian policy of special solicitude.

516. *See* Steven K. Carr, *Living and Dying in the Post-*Miles *World: A Review of Compensatory and Punitive Damages Following* Miles v. Apex Marine Corp., 68 TUL. L. REV. 595, 624-25 (1994) (noting that in the wake of *Miles* it is apparent legislative and maritime tort reform is needed to provide uniformity in awarding non-pecuniary elements of tort recovery under maritime law). *See also* MARITIME LEGISLATION COMM., MARITIME LAW ASS'N OF THE U.S., Uniform Maritime Standards for Award of Punitive Damages (Final Draft Proposal Aug. 6, 1993).

517. *See supra* notes 1, 5, 44, 47-48, 79-82 and accompanying text regarding seamen's rights and discussing the principles of uniformity and special solicitude.

518. *See Walker*, 861 F. Supp. at 537-38.

statutes, and under most state wrongful death statutes, from the point of view of a beneficiary, there are advantages if their decedent's fatal accident occurs on navigable waters rather than on an interstate highway.[519] The Ninth Circuit's decision in *Earles II*, extending loss of society damages to non-dependent parents, was based precisely on this misinterpreted notion of special solicitude.[520]

The issue begs resolution: What policy can possibly justify the anomalous recovery that would have occurred between the beneficiaries of seamen and non-seamen had the WHISKEY RUNNER not hit a buoy, but instead had collided with a fishing boat in the harbor, and some crew members on the fishing boat were killed? In order to remedy the current anomalies illustrated by the Ninth Circuit's holding in *Earles II*, Congress should revamp the maritime remedial scheme to allow damages commensurate with the common law of torts and make provisions for flexible treatment of developments therein.[521] In the alternative, the Supreme Court should define the elements of recoverable damages for wrongful death of a non-seaman in territorial waters; after twenty five years of "further sifting" in the lower courts, the time is ripe.[522]

3. *Even if Loss of Society Damages are Allowed to Beneficiaries of Non-Seamen in General Maritime Law Wrongful Death Actions, Admiralty Courts Should Engage in a Factual Analysis of Loss Before Extending Recovery to All Beneficiaries With Standing*

In *Earles II*, the Ninth Circuit implicitly denied any distinction between elements of damages the court awarded when it resolved the loss of society dependency issue by asserting that parents had standing to recover under DOHSA and the Jones Act regardless of dependency.[523] Although it is true that the parents had standing to recover *damages* by analogy

519. GRANT GILMORE AND CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY, § 6-33, at 370 (2d ed. 1975).

520. *See Earles II*, 26 F.3d at 917.

521. *See supra* note 510.

522. *See supra* note 10, 133-37 and accompanying text.

523. *See* Sutton v. Earles ("Earles II"), 26 F.3d 903, 915 (9th Cir. 1994).

to DOHSA, that did not necessarily mean that they could recover all *elements* of damages absent proof of loss.[524] The overwhelming majority of federal courts deciding the issue under the general maritime law do not allow loss of society to non-dependents, because such a rule is a rational and efficient method of fashioning a schedule of beneficiaries for loss of society.[525]

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524. *See* SPEISER, *supra* note 484, § 3:51, at 238-41 (3d ed. 1992) (noting that generally, before loss of society damages can be awarded, proof of loss must be established, and that a suitor's relationship is merely one factor to consider). Note that the Supreme Court in *Gaudet* cited Speiser as authority for propositions on wrongful death law when the Court introduced recovery for loss of society into the general maritime law, including the weighty proposition that recovery for such loss was the majority trend in American jurisprudence. *See* Sea-Land Services v. Gaudet, 414 U.S. 573, 585-88 (1974).

525. *See* Zicherman v. Korean Air Lines Co., Ltd., No. 93-7490, 1994 WL 685690, at *3-4 (2d Cir. Dec. 5, 1994) (holding that federal maritime law does not allow recovery for loss of society to non-dependent family members); *see also* Air Disaster at Lockerbie Scotland on December 21, 1988, 37 F.3d 804, 828-30 (2d Cir. 1994) (holding that federal maritime law does not allow recovery for loss of society to non-dependent family members); Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084, 1090-93 (2d Cir. 1993) (holding that the non-dependent parents of a non-seaman killed in territorial waters could not recover loss of society damages under general maritime law), *cert. denied*, 114 S. Ct. 1060 (1994); Anderson v. Whittaker Corp., 894 F.2d 804, 811-12 (6th Cir. 1990) (holding that the non-dependent parents of non-seamen killed in territorial waters could not recover loss of society damages under general maritime law); Miles v. Melrose, 882 F.2d 976, 989 (5th Cir. 1989) (holding that the non-dependent parent of a seaman killed in territorial waters could not recover loss of society damages under general maritime law), *aff'd sub nom.* Miles v. Apex Marine Corp., 498 U.S. 19 (1990); Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455, 458-60 (5th Cir. 1985), *reh'g denied*, 775 F.2d 301 (5th Cir. 1985), *cert. denied*, 479 U.S. 1019 (1986); Fajardo v. Maersk Line Agency, 1989 A.M.C. 1923, 1924-28 (D. Md. 1988) (not otherwise reported); Truehart v. Blandon, 672 F. Supp. 929, 936-38 (E.D. La. 1987); Glod v. American President Lines, Ltd., 547 F. Supp. 183, 184-86 (N.D. Cal. 1982); Lipworth v. Kawasaki Motors Corp. U.S.A., 592 So. 2d 1151, 1154-55 (Fla. Dist Ct. App. 1992) (holding the non-dependent parents of non-seamen killed in territorial waters could not recover loss of society damages under general maritime law); Perlman v. Valdes, 575 So. 2d 216, 216-17 (Fla. Dist. Ct. App. 1990) (holding that the non-dependent parents of a non-seaman killed in territorial waters could not recover loss of society damages under general maritime law); *but see Earles II*, 26 F.3d at 914-917 (holding that loss of society damages could be awarded to the parents of non-seamen killed in territorial waters regardless of dependency). *Cf.* Evich v. Connelly, 759 F.2d 1432 (9th Cir. 1985) (holding that because siblings are not spouses, children, or parents they must, like under DOHSA, prove dependency to recover damages for maritime wrongful death). *See generally* Cantore v. Blue Lagoon Water Sports, Inc., 799 F. Supp. 1151, 1152-55 (S.D. Fla. 1992) (holding that the parents of non-seamen killed in territorial waters may recover loss of society damages under general maritime law only if they are financially dependent on the decedent).

Whether a dependency rule is fair, however, is arguable, because it is conceivable a non-dependent beneficiary might suffer a genuine loss from being denied their decedent's continued existence.[526] In *Rollins v. Peterson Builders, Inc.* for example, the record denotes an association between the decedent and her beneficiary that evidenced loss of society, yet the beneficiary was non-dependent.[527] Thus, if loss of society damage awards are to remain at the discretion of trial courts, and if the majority of courts applying federal maritime law apply a dependency rule, whether the beneficiary is a financial dependent of the decedent should at least be a factor.[528]

If loss of society damages remain recoverable under the general maritime law, a fair solution to awarding them is that it be reversible error for a trial judge to award loss of society damages without first considering factors tending to establish the right to recover.[529] This approach with regard to proof of loss is in accord with the majority of state jurisdictions and federal court actions where loss of society type damages are allowed.[530] *Patton-Tully* and *Neal* are two Fifth Circuit admiralty cases where this type of fact analysis was employed.[531] The Second and Sixth Circuits' decisions in *Zicherman* and *Anderson* have also taken this approach.[532] Moreover, in *Bergen*, even the Ninth Circuit itself scrutinized dependency when deciding whether to award wrongful death recovery while sitting in admiralty.[533]

Among factors the district courts should consider when deciding whether to award loss of society in maritime cases, dependency should be paramount, giving deference to the great

526. *See Zicherman*, 1994 WL 685690, at *3 (noting that "[n]o doubt [a dependency] rule denies recovery to some deserving parties; nondependent survivors may feel the loss of a loved one as keenly as dependent survivors."); Rollins v. Peterson Builders, Inc., 761 F. Supp. 918, 921-24 (D.R.I. 1990).

527. *Rollins*, 761 F. Supp. at 920-24.

528. *See* SPEISER, *supra* note 484, § 3:51, at 238-41.

529. *See id.*

530. SPEISER, *supra* note 484, § 3:51, at 238-41.

531. Patton-Tully Transp. Co. v. Ratliff, 797 F.2d 206, 208-213 (5th Cir. 1986); Neal v. Barisich, Inc., 707 F. Supp. 862, 872-73 (E.D. La. 1989), *aff'd*, 889 F.2d 273 (5th Cir. 1989).

532. *Zicherman*, 1994 WL 685690, at *3-4; *Anderson*, 894 F.2d at 811-12.

533. *See supra* note 300 and discussing *Bergen*.

weight of authority in the non-seamen context which consider dependency the critical factor.[534] Other factors admiralty courts should consider were suggested by *Neal* (common residency, habit of the deceased to tender comfort) and *Rollins* (common residency, harmonious family relations, participation of deceased in family activities).[535] Moreover, the proposed solution is in accord with the Fifth Circuit's recent pronouncement in *Randall*, and the Second Circuit's recent dicta in *Zicherman*, that awards for loss of society damages should not *solely* be based on dependency because deserved parties could necessarily be excluded.[536] Under the proposed solution, such deserved parties could recover because no one factor would be determinative.[537]

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534. *See supra* note 137.

535. *See* SPEISER, *supra* note 484, § 3:51, at 241. Speiser's factors, priority ranked from senior to junior, are as follows:

(1) Familial Relationship;
(2) Financial Dependency;*
(3) Continuous Residency;
(4) Harmonious Relations;
(5) Common Interests;
(6) Participation in Family Activities;
(7) Habit to Tender Solace;
(8) Value of Advice.

See id.; *dependency is inserted at the rank at which it might be considered.

536. *Zicherman*, 1994 WL 685690, at *3 (noting that "[n]o doubt [a dependency] rule denies recovery to some deserving parties; non-dependent survivors may feel the loss of a loved one as keenly as dependent survivors."); Randall v. Chevron, U.S.A., Inc., 13 F.3d 888, 903 (5th Cir. 1994) (noting that, "[i]n our view, the law of this circuit does not unequivocally limit recovery of loss of society damages for the wrongful death of a parent to children who are financially dependent on the decedent."); *see also* Complaint of Nobles, 842 F. Supp. 1430, 1434 n.8 (N.D. Fla. 1993) (noting that, "[t]his court finds that the reasoning that ties recovery for loss of society to financial dependency strained, and, therefore, will not adhere to the conclusion reached [that dependency is determinative]); Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084, 1092 (2d Cir. 1993) (noting that, "an essentially pecuniary standard such as dependency should not provide the dividing line . . . given the [non-pecuniary] nature of loss of society damages"), *cert. denied*, 114 S. Ct. 1060 (1994); Choat v. Kawasaki Motors Corp., 1994 A.M.C. 2626, 2640 (Ala. 1994) (declining loss of society damages regardless of dependency). *But cf.* Walker v. Braus, 861 F. Supp. 527 (E.D. La. 1994) (recognizing that by concluding loss of society damages are not allowed in a general maritime wrongful death action, "implies that the dependency requirement for recovering loss of society damages under general maritime law is no longer viable"), *remand before decision*, 995 F.2d 77 (5th Cir. 1993); *Earles II*, 26 F.3d at 914-17 (awarding loss of society damages regardless of dependency).

537. *See* SPEISER, *supra* note 484, § 3:51, at 238-41. Although *Earles II* could appear to comport with the proposed solution (because therein the Ninth Circuit affirmed the parents' awards for loss of society regardless of dependency), it

In *Gaudet*, the Supreme Court noted that loss of society was measurable by trial courts and that, if not, appellate courts had the ability to control excessive awards.[538] The Court therefore granted the district courts discretion to award loss of society damages pursuant to their constitutional grant of admiralty jurisdiction and consistent with that grant's implicit mandate on uniformity.[539] In *Higginbotham*, the Court counseled the district courts not to unduly effect uniformity by awarding substantial damages for loss of society in non-seamen cases.[540] Therefore, when, as in *Earles II*, a district court declines to analyze proof of loss, and then awards substantial recovery for loss of society to the beneficiaries of non-seamen, its judgment should be vacated.[541] Moreover, when an appeals court, as the Ninth Circuit, affirms such an award based on an anomaly in admiralty uniformity, the decision should be reversed.[542] Doing so would ensure that admiralty courts equitably award loss of society damages, and further the aim of uniformity by precluding appellate courts from creating anomalous rules.[543]

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should be obvious that, under the proposed solution, the awards would warrant further consideration because the district court failed to consider *any* factors when awarding recovery. *See supra* note 535 listing factors that admiralty courts might consider in determining whether a beneficiary could recover for loss of society.

538. *Gaudet*, 414 U.S. at 590.

539. *Id.*

540. Mobil Oil v. Higginbotham, 436 U.S. 618, 624-25 n.20 (1978).

541. *See* Steven K. Carr, *Living and Dying in the Post-*Miles *World: A Review of Compensatory and Punitive Damages Following* Miles v. Apex Marine Corp., 68 TUL. L. REV. 595, 624-25 (1994) (hypothesizing that appellate review would possibly remedy the anomalies caused by the few district and state court decision which strayed from the majority's broad interpretation of the uniformity component in *Miles*).

542. *See Higginbotham*, 436 U.S. 618, 624-25 n.20 (1978).

543. *See, e.g., Earles II*, 26 F.3d at 914-17; *Walker*, 861 F. Supp. at 527, 535 (noting that the Ninth Circuit's holding in *Earles II* creates non-uniformity between circuits, non-uniformity within the Ninth Circuit, and is non-uniform with basic admiralty law tenets). It should be noted the proposed solution assumes loss of society is still allowable in the post-*Miles* era. *See id.*

VI. CONCLUSION

The doctrine of uniformity has been a dominant theme in the general maritime law since the Supreme Court first explained its special significance to American maritime jurisprudence over a century ago.[544] Another well-settled matter in general maritime law is that the humane character of proceedings in admiralty provide "special solicitude" to seamen.[545] In *Earles II*, the Ninth Circuit decided that loss of society damages could be liberally extended to the non-dependent parents of non-seamen in a general maritime wrongful death action ("*Moragne* action")[546] without conflicting with the spirit of the uniform recovery rule that the Supreme Court applied to seamen in *Miles v. Apex Marine*.[547]

The *Earles II* holding is alarming because it is an example of the very anomaly in maritime wrongful death recovery that the Supreme Court sought to remedy by creating an action for wrongful death in admiralty jurisdiction; that is that seamen, the "wards of admiralty," are provided less protection than non-seamen.[548] Since the Ninth Circuit de-emphasized the principle of uniformity, the ultimate question now faced by practitioners, as well as District Courts sitting in admiralty within the Ninth Circuit, is whether the failure on the part of Congress to keep wrongful death damages consistent with

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544. *See supra* notes 14, 49-55 and accompanying text for a discussion on uniformity.

545. Sea-Land Services v. Gaudet, 414 U.S. 573, 587-88 (1974) (holding that loss of society was incorporated into general maritime law, "to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction."); Moragne v. States Marine Lines, 398 U.S. 375, 386-88 (1970) (holding that a cause of action for wrongful death exists under general maritime law, because the common law rule denying a remedy for wrongful death is unjust and incompatible with maritime equitable principles); The Sea Gull, 21 F. Cas 909, 910 (C.C.D. Md. 1865) (the leading case advocating that, "it better becomes the humane and liberal character of proceedings in admiralty to give [rather] than to withhold [a] remedy, when not required to withhold it by established and inflexible rules."). *See supra* notes 5, 47-48 and accompanying text for a discussion on special solicitude.

546. *See Moragne*, 398 U.S. at 409 (creating a court-made wrongful death action in the general maritime law).

547. Sutton v. Earles, ("Earles II") 26 F.3d 903, 916-17 (9th Cir. 1994); *see also* Miles v. Apex Marine Corp., 498 U.S. 19, 33 (1990).

548. *Moragne*, 398 U.S. at 395; *Earles II*, 26 F.3d at 916-17; *see supra* note 1.

"special solicitude for seamen" can be permitted to eviscerate the need for uniformity, which gives rise to the District Courts' grant of admiralty and maritime jurisdiction in the first place. If so, the Supreme Court may ultimately be spared the necessity of deciding the issue of whether to award loss of society to the beneficiaries of non-seamen killed in territorial waters under general maritime law, because the issue would remain a policy decision for the lower courts to make on a case-by-case basis.[549] If the Supreme Court continues on the course charted in *Higginbotham* and *Miles*, which favors uniformity generally, the Court must announce a rule for awarding damages to non-seamen's beneficiaries. One thing is certain, when courts fashion policy to escape the intent of antiquated and inflexible Congressional enactments, the need for review of those enactments by Congress is in order.[550]

With the wind of uniformity blowing from the Supreme Court, and the tide of recent general maritime case law denying non-dependents recovery for loss of society, the Ninth Circuit misapplied the law of maritime wrongful death damages by departing from the dependency requirement used in other circuits.[551] In severing the federal interest in uniformity from the principle of liberal extension of remedies under the general

549. *See Gaudet*, 414 U.S. at 590 (granting lower courts the discretion to calculate and award loss of society damages); *Moragne*, 398 U.S. at 408 (declining to fashion a general maritime wrongful death schedule of beneficiaries and elements of damages identical to DOHSA, thereby leaving open the issues of what damages could be recovered, and by whom, in a *Moragne* action).

550. *See* Steven K. Carr, *Living and Dying in the Post-*Miles *World: A Review of Compensatory and Punitive Damages Following* Miles v. Apex Marine Corp., 68 TUL. L. REV. 595, 607-608 (1994) (noting that since *Miles*, the majority trend is to decline awards for loss of society in maritime wrongful death actions). Significantly, Carr pointed out that at the time his paper was published, January, 1994, only a few district courts and state courts had strayed from the majority's broad interpretation of the uniformity component of *Miles*. *Id.* Carr thus hypothesized that appellate review would possibly remedy the anomalies caused by *Miles*. *Id.* The Ninth Circuit has since chosen to aggravate the cleavage, between seamen's recovery and non-seamen's recovery, that *Miles* causes when its uniform recovery rule is not applied in general maritime wrongful death cases involving non-seamen.

551. *See* Cantore v. Blue Lagoon Water Sports, Inc., 799 F. Supp. 1151, 1152-55 (S.D. Fla. 1992) (holding that maritime wrongful death plaintiffs may recover loss of society damages for the death of non-seamen in territorial waters only if they are financial dependents of the decedent). *See also supra* notes 10, 137 and accompanying text for a discussion on the financial dependency requirement used by the majority of federal circuits when awarding loss of society damages under the general maritime law.

maritime law, the Ninth Circuit adopted a rule that is in conflict with both jurisdictional uniformity and "special solicitude" as it applies to seamen.

Does limiting *Miles'* uniform recovery rule to seamen's cases, and then abandoning the "twin aims of admiralty" analysis to extend loss of society to the non-dependent beneficiaries of non-seamen provide uniformity to maritime law and solace to the families of seamen? *Not with that wind blowing, and this tide.*[552] Since the Supreme Court decided *Moragne*, twenty five years of "further sifting" through the lower courts has led to uncertainty for maritime practitioners, anomalous recovery for maritime tort victims, and the current split in the circuits on the dependency issue. In order to prevent further injustice the Court should, heeding its own call for uniformity, announce a policy for awarding wrongful death damages to the beneficiaries of non-seamen killed in territorial waters.

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552. *See* KIPLING, *supra* note 1, at 216.

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